Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. ______________

STATE OF OHIO,
Petitioner,
v.
PETERSON, LOWRY, RALL, BARBER & ROSS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

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Petitioner, The State of Ohio (plaintiff-appellant below), prays that a Writ of Certiorari issue to review the April 24, 1981, decision of the United States Court of Appeals for the Tenth Circuit by which summary judgment was entered against the State of Ohio.

QUESTIONS PRESENTED FOR REVIEW

This Petition for a Writ of Certiorari raises fundamental legal questions of general applicability regarding: (1) the legal standard to be used by the federal courts in granting summary judgment motions; (2) the federal tolling doctrine; and (3) the effects that a wrongdoer's affirmative acts of concealment of fraudulent conduct have upon the running of the statute of limitations in an action brought under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976) and S.E.C. Rule 10b-5, 17 C.F.R. § 240.10b-5.

Your petitioner presents the following questions for review:

1. Whether the April 24 opinion of the United States Court of Appeals for the Tenth Circuit is contrary to the Seventh Amendment to the Constitution of the United States, decisions of this Court and every Court of Appeals, and the express language of Rule 56(c), Fed.R.Civ.P., in that the opinion permits the trial court, on motion for summary judgment, to resolve genuine issues of material fact in favor of the moving parties and to dismiss a securities action for money damages based upon the defense of statute of limitations when ". . . the documents before the court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such a time as to bar the action?" (A-68).

2. Whether the April 24 opinion below incorrectly rejects the rule applied by the Courts of Appeals for the Second and Seventh Circuits,[1] tolling the statute of limitations as to individuals who actively conceal their roles in a fraud until plaintiff's *actual* discovery of their participation, and thereby encourages participants in a complex securities fraud to conceal their partcipation in the fraud (as occurred here) by affirmative statements and acts, including destruction of documents?

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[1] See, e.g., *Robertson* v. *Seidman & Seidman,* 609 F.2d 583, 593 (2d Cir. 1979); *Goldstandt* v. *Bear, Stearns & Co.,* 522 F.2d 1265, 1268 (7th Cir. 1975); *Tomera* v. *Galt,* 511 F.2d 504, 510 (7th Cir. 1975).

3. Whether this Court's recent decision in *Board of Regents* v. *Tamanio*, 446 U.S. 478 (1980), requires (contrary to the conclusion reached in the April 24 opinion below) that in actions under section 10(b) of the Securities Exchange Act of 1934, the federal court apply not only the analogous state statute of limitations, but also the state statutes and court decisions concerning tolling of the applicable limitations period?

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceedings in the Court of Appeals for the Tenth Circuit:

State of Ohio, petitioner (plaintiff-appellant below);

Peterson, Lowry, Rall, Barber & Ross,
Peterson, Ross, Rall, Barber & Seidel,
Timothy G. Lowry,
Herbert C. Loth, Jr.,
Abe R. Peterson,
Owen Rall,
Henry P.C.W. Barber,
Richard V. Henry, Jr.,
Gerhard E. Seidel,
J. Haydon MacDonald,
Elroy C. Sandquist, Jr.,
Irving G. Swenson,
Robert G. Schloerb,
Theodore J. Tsoumas,
J. Robert Geiman,
Thomas K. Peterson,
John G. Campbell,
Peter M. Sfikas,
Robert S. Milnikel,
Richard S. Borland,
Russell M. Pelton, Jr., respondents (defendants-appellees below).

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OPINIONS BELOW

On March 25, 1977, the United States District Court for the District of Colorado dismissed this action as barred by the applicable statute of limitations in an opinion which is not reported, but is set forth at pages A-4 to A-11 of the Appendix to this Petition. The Court of Appeals for the Tenth Circuit reversed the District Court's March 25 ruling and remanded this action in an opinion reported at 585 F.2d 454 and set forth at pages A-12 to A-20 of the Appendix.

Following remand, the District Court dismissed this action in an opinion reported at 472 F. Supp. 402 and set forth at pages A-21 to A-41 of the Appendix. On February 23, 1981, the Court of Appeals affirmed the District Court's dismissal in an unreported decision which is set forth at pages A-42 to A-56 of the Appendix. The February 23 opinion of the Court of Appeals was withdrawn and superseded by an opinion entered on April 24, 1981, which is not yet reported and is set forth at pages A-57 to A-71 of the Appendix.

THE JURISDICTION OF THIS COURT

The most recent opinion of the Court of Appeals for the Tenth Circuit was entered April 24, 1981. Rehearing and suggestions for rehearing in *banc* were denied on April 24, 1981 and May 26, 1981. On July 20, 1981, Mr. Justice White granted Ohio's motion for an extension of time within which to file this Petition to and including August 2, 1981. The Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional provisions, statutes and rules which may be relevant to the issues raised in this Petition are reproduced at

A-1 through A-3, *infra*, and include the *U.S. Const.* amend. V and VII; Sections 10(b) and 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78aa (1976); S.E.C. Rule 10b-5, 17 C.F.R.§240.10b-5; and Colo. Rev. Stat.§13-80-109 (1973).

STATEMENT OF THE CASE

The plaintiff in this action is the State of Ohio ("Ohio") which was defrauded in connection with its purchase, in April and May, 1970, of two promissory notes issued by King Resources Company ("KRC"). Ohio was defrauded as a result of numerous false and misleading statements contained in KRC's 1968 and 1969 financial statements.

The defendants are: Peterson, Lowry, Rall, Barber & Ross ("the Firm"), one of the law firms that served as outside counsel to KRC; a successor partnership to the Firm; and the partners of the Firm, including Timothy G. Lowry, an ex-partner of the Firm who had served as KRC's general counsel.

Ohio filed its Complaint against the Firm and its partners on October 7, 1976.[2] In its Complaint, Ohio alleged, *inter alia*, that it had been defrauded in connection with its purchase, in April and May, 1970, of two promissory notes of KRC, which notes were in the amounts of Three Million Dollars and Five Million Dollars, respectively. Ohio further alleged that Lowry and the Firm participated and conspired with, and aided and abetted, KRC, John M. King and others, in misrepresenting KRC's financial condition in violation of Section 20 and Section 10(b) of the Securities Exchange Act of 1934 and Section

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[2] Both the District Court and Court of Appeals concluded that the three-year statute of limitations period contained in Colo. Rev. Stat. § 13-80-109 applies to Ohio's claims under the Securities Exchange Act of 1934. None of the parties has contested that ruling.

17(a) of the Securities Act of 1933.[3] In addition, Ohio alleged in paragraph 34 of its Complaint that "defendants concealed their violative conduct from plaintiff and plaintiff did not discover the violative conduct of defendants herein until within the year next preceding the filing of this complaint." Trial by jury was demanded.

On January 31, 1977, Lowry and the Firm filed separate motions to dismiss, arguing that Ohio's action was barred by the applicable statute of limitations. These motions were granted by the District Court. (A-4 to A-11). The Court of Appeals reversed the District Court's dismissal, because the District Court had erred in failing to comply with Rule 12(b) and Rule 56, Fed. R. Civ. P., by treating the motions to dismiss as motions for summary judgment "without permitting [Ohio] an opportunity to present pertinent material." (A-19). The Court of Appeals expressly refused to indicate whether the case could, or could not, "be finally determined after there has been compliance with Rule 56." (A-19).

The action was remanded to the District Court for further proceedings. By order dated October 6, 1978, the District Court notified the parties that defendants' motions to dismiss would be treated as motions for summary judgment. (A-24 to A-25).

Ohio filed an Amended Complaint, which supplemented the allegations of paragraph 34 so as to provide, in part, that:

> While plaintiff contends that the defendants' fraudulent concealment of their actions which caused plaintiff's loss frees plaintiff from any duty to exercise diligence in discovering the fraud perpetrated against it, plaintiff, nevertheless, exercised such diligence as was due and

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[3] On April 17, 1972, Ohio filed a Complaint with respect to its purchase of the KRC notes, naming as defendants, among others KRC, John M. King, Arthur Andersen & Co., Dun & Bradstreet and Crofters, Inc.

> proper under the circumstances of this case. Plaintiff made diligent efforts to obtain documents and generally conducted discovery which would have uncovered defendants' fraud.

Paragraph 34 of Ohio's Amended Complaint.

A. Evidence Relating To Ohio's Discovery Of Defendants' Participation In The Fraud And Defendants' Concealment Of Their Roles In The Fraud

In opposition to defendants' motions to dismiss (which were being treated as motions for summary judgment), Ohio submitted affidavits, deposition testimony and documentary evidence which established that Ohio did not discover or otherwise come to know until January 5, 1976, any information or facts indicating that Lowry or his firm knew of, or participated in, any fraud upon Ohio. During a January 5, 1976, deposition of Lowry in a separate action (see footnote 3, *supra*), Ohio discovered for the first time that Lowry had knowledge of, but did not disclose, the existence of a "side agreement" or buyback agreement which nullified a purported "sale" of certain KRC properties. Although Lowry had an office in Denver and many KRC files were kept there, the "side agreement" was not kept in KRC's offices where it could be discovered. Rather, *Lowry hid the "side agreement" among his personal papers in the Firm's vault in Chicago, Illinois and then destroyed the "side agreement" in December, 1971 or early 1972.*[4] Nondisclosure of the "side agreement" allowed KRC to include in its year-end 1969 financial statements a $4.2 million profit on the "sale" (treated as if it were a sale to unrelated third parties) of certain properties and enabled Investor's Overseas Services, Ltd. (KRC's principal customer) to write up the book value of the remaining like property in the approximate amount of $100,000,000.

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[4] On November 16, 1970, the Securities and Exchange Commission ("SEC") filed its Complaint in *SEC* v. *Crofters, Inc.* The SEC Complaint sought injunctive relief against seventeen defendants, including KRC and John M. King. The SEC action was based upon Ohio's purchase of the KRC promissory notes. Neither Lowry nor the Firm were named as defendants in *SEC* v. *Crofters, Inc.*

In connection with its April 10, 1970, audit report on KRC's year-end 1969 financial statements, Arthur Andersen & Co. requested and received from John M. King and Lowry a "representation letter" dated April 10, 1970. This letter represented to Arthur Andersen & Co. that:

> With respect to all 1969 and prior sales transactions, there is *no present commitment* or intent (not made known to you) by the company or any of its affiliates to *reacquire the property interests* sold, guarantee the economic results of the transactions, or defer payment by the purchaser until the property interests sold became productive. (Emphasis supplied.)

During Lowry's January 5, 1976, deposition, Ohio discovered (contrary to the representation letter to Arthur Andersen) that a "buy-back" agreement did exist, that Lowry was intimately familiar with the agreement, and that Lowry hid the agreement among his personal papers in the Firm's safe and later destroyed it.

B. Evidence Relating To Ohio's Due Diligence In Discovering Who Had Participated In The Fraud Perpetrated Upon It

Ohio submitted affidavits and documentary evidence to the District Court which showed that it had exercised due diligence in attempting to discover who had committed the complex fraud perpetrated upon it. Ohio showed the District Court that, among other things, it had filed a Complaint (on April 17, 1972) in *State of Ohio* v. *Crofters, Inc., et al. ("Crofters")*, Civil Action No. 72-138 in the Southern District of Ohio, Eastern Division, seeking money damages arising from its purchase of the KRC promissory notes. Lowry and the Firm were not named as defendants in the *Crofters* action.

Ohio also showed that its Complaint in the *Crofters* action was substantially derived from a Complaint filed in 1970 by the SEC based upon the same transactions complained of by Ohio. In *SEC* v. *Crofters*, the Commission alleged that KRC, in connection with its sale of notes to Ohio, had misrepresented to Ohio the nature of Dun & Bradstreet's "prime" rating and had also failed to disclose material facts concerning its financial condition and the proposed use of the proceeds derived from the sale of the promissory notes.

Ohio showed the District Court that prior to filing the *Crofters* action, Ohio had reviewed the documents contained in the file of the State Treasurer, whose office had been responsible for the purchase of the KRC notes, and had examined the SEC files to the extent permitted by the SEC's Denver office. In its *Crofters* complaint, Ohio named the defendants who had been named by the SEC in its *Crofters* complaint. In addition, based upon documents found in the Ohio Treasurer's files, Ohio named Arthur Andersen & Co. and Dun & Bradstreet as defendants. The SEC had not named Lowry or his law firm as defendants in *SEC* v. *Crofters*.

Ohio did not name Lowry and the Firm in the *Crofters* complaint because, at the time it was filed, Ohio had not discovered or otherwise known information or facts which indicated that Lowry and the Firm had participated in any fraud upon Ohio.[5]

In contrast to the ability of the SEC to conduct formal discovery regarding the complex KRC fraud, Ohio was barred until 1975 by the District Court's orders from conduct-ing any discovery in *Crofters*. Shortly after the defendants named in *Crofters* filed answers, Ohio filed its December 15, 1972, motion for order compelling discovery. In December, 1972, the Judicial Panel on Multidistrict Litigation ordered the *Crofters* action transferred to Colorado for "coordinated or consolidated pretrial proceedings." *In re King Resources Securities Litigation*, 352 F. Supp. 975, 976 (JPML 1972). On December 29, 1972, Ohio renewed its motion for order compelling discovery. In response, District Judge Finesilver entered an order on January 2, 1973, staying all discovery in *Ohio* v. *Crofters*. This stay of discovery was in effect from January 2, 1973, to February 10, 1975, and, subsequently discovery in *Ohio* v. *Crofters* was again stayed from August 14, 1975, to October 24, 1975. On January 5, 1976, Ohio deposed Lowry in *Ohio* v. *Crofters.* (See pages 4-5, *supra.*)

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[5] As we noted above, Ohio submitted affidavits from attorneys representing Ohio who stated that they were aware of no information or facts implicating Lowry and the Firm in the fraud until January, 1976.

Ohio further showed the District Court that it had investigated its claims through informal means while it was barred from engaging in formal discovery. By affidavit, Ohio proved that its attorneys had reviewed *unsealed* exhibits filed with the Trustee's report in the KRC bankruptcy proceedings. None of the unsealed exhibits reviewed by Ohio's attorneys appeared to implicate Lowry or the Firm in the fraud perpetrated upon Ohio.

During the summer of 1974, Ohio filed motions in the various bankruptcy proceedings for modification of the pending stay orders. Ohio's motion with respect to the KRC Chapter X proceedings was denied by District Judge Fred M. Winner on July 10, 1974. In so ruling, the court adopted the findings of a Special Master who noted that the attorney for the Trustee had assured the court that information sought by Ohio would be made available. However, as Arthur O. Carraway , one of Ohio's expert accounts, testified by affidavit:

> At my suggestion, Ohio made repeated requests to the trustee for King Resources Company seeking access to its books and records so that we could examine such books and records as they were maintained by King Resources

> Company in the ordinary course of business. *Those requests were denied. The trustee for King Resources Company said in my presence that it would not cooperate with the State of Ohio.* . . . The trustee's attorney insisted that Ohio submit specific document requests. We did so. *Most of Ohio's requests were denied.* Only a few documents were eventually produced by the trustee. *This seriously hampered Ohio's discovery efforts by forcing us to rely on such documents and copies of original documents as we could obtain from Arthur Andersen and Company's working papers and other sources.* (Emphasis supplied).[6]

Ohio further showed the District Court that other lawsuits in which Lowry and the Firm were named as defendants did not involve alleged wrongdoing which would form the basis of a claim *by Ohio* arising from its purchase, in April and May, 1970, of KRC's promissory notes.

C. The District Court and Court of Appeals Opinions Below

Despite Ohio's submission of affidavits, deposition testimony and documentary evidence demonstrating that it did not have *actual* knowledge of the involvement in the fraud of Lowry and the Firm until January, 1976, and demonstrating Ohio's diligent efforts to identify the individuals involved in the fraud, the District Court granted defendants' motions for summary judgment and dismissed Ohio's Complaint.

The Court of Appeals affirmed the District Court's order, but on grounds different from those relied upon by the District Court. The Court of Appeals did *not* conclude that there existed *no* genuine issue of material fact regarding when Ohio discovered or, in the exercise of due diligence, should have discovered Lowry's and the Firm's participation in the fraud. Rather, a panel of the Court of Appeals created a wholly new, unique and unconventional standard applicable to summary judgment motions involving statute of limitations defenses. The Court of Appeals' opinion[7] enunciated a new test which empowers a District Court to resolve factual issues concerning a statute of limitations defense and grant summary judgment, as long as "... the documents before the Court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such a time as to bar the action." (A-68).

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[6] In *Ohio* v. *Crofters, Inc.*, Arthur Andersen & Co. refused to comply voluntarily with certain of Ohio's discovery requests. As a result of Arthur Andersen's "willful attempt to withhold production of documents," the District Court imposed substantial sanctions upon it. *State of Ohio* v. *Arthur Anderson & Co.*, 75 F.R.D. 12, 20 (D. Colo. 1977), aff'd, 570 F.2d 1370 (10th Cir. 1978).

The Court of Appeals below rejected the rule adopted by the Court of Appeals for the Second and Seventh Circuits which tolls a statute of limitations until a defrauded plaintiff *actually* discovers the fraudulent acts of an individual who actively concealed his role in the fraud. (A-69 to A-70).

The Court of Appeals further refused to apply Colorado law regarding tolling of the statute of limitations, despite this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980). (A-62 to A-64).

REASONS FOR GRANTING THE WRIT

The April 24, 1981, Opinion of the Court of Appeals in this action is in direct conflict with the decisions of every other Court of Appeals in that it permits the granting of summary judgment despite the existence of a genuine issue of material fact so long as the trial court finds that documentary evidence clearly and convincingly supports the moving party's position. The legal standard for ruling upon summary judgment decisions should be the same in all federal courts and Rule 56, Federal Rules of Civil Procedure, requires that it be so. Nevertheless, the dismissal of Ohio's case against Lowry and his firm has been affirmed by the Court of Appeals for the Tenth Circuit when by the standard applied by every other Circuit, Ohio would be allowed to present its case to a jury.

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[7] The Court of Appeals issued its first opinion on February 23, 1981, (A-42 to A-56). In the February 23 opinion, the Court of Appeals made factual findings against Ohio which were clearly not supported by the record below. The February 23 opinion was withdrawn by the Court and superseded by the April 24, 1981 opinion.

In its opinion, the Court of Appeals itself recognized that its decision conflicted with the decisions of the Second Circuit and the Seventh Circuit on the issue of whether Lowry's fraudulent concealment of his involvement in the fraud upon Ohio tolled the statute of limitations until Ohio actually discovered his fraud. As set forth below, the law in the Second and Seventh Circuits is that when a defendant takes affirmative steps to conceal his fraud, the running of the statute of limitations is tolled until the victim *actually* discovers the fraudulent conduct. The Tenth Circuit in this action has held that fraudulent concealment produces no such result; if the average plaintiff would have discovered the fraud despite the concealment, the statute runs anyway.

In this case, the application of that rule is particularly onerous. In their home state of Illinois in the Seventh Circuit, defendants would be required to defend this action on the merits despite their successful double fraud. Only because their case was heard in Colorado may they walk away having benefited from not one but two successful frauds upon Ohio.

The decision of the Court of Appeals in this action also conflicts with the decision of the Court of Appeals for the

Fourth Circuit[8] because the Tenth Circuit refused to follow this Court's decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), and consider Colorado law concerning the tolling of the statute of limitations. As fully set forth below, a proper application of such law would require that the statute begin to run only when Ohio *actually* discovered Lowry's fraud upon it.

I. The Decision Below Is An Unprecedented Departure From The Universally Recognized Standards Applicable To Motions For Summary Judgment And Creates A Wholly New Procedure Empowering The Trial Court (Rather Than The Jury) To Resolve Genuine Issues Of Material Fact Concerning Tolling Of The Statute Of Limitations Upon A Showing By The Moving Party Of Clear And Convincing Evidence In Its Favor; Such A Procedure Deprives Ohio Of Its Constitutionally Guaranteed Right To A Trial By Jury And, If Permitted To Stand, Will Deprive Many Other Similarly Situated Litigants Of Their Right To Trial By Jury

A. Decisions of This Court, Every Court of Appeals and the Express Language of Rule 56 (c), Fed. R. Civ. P., Permit the Granting of Summary Judgment Only Where There Exists No Genuine Issue of Material Fact and Where the Moving Party Is Entitled to Judgment as a Matter of Law

The legal standards applicable to motions for summary judgment, pursuant to Rule 56, Fed. R. Civ. P., have been consistently and clearly enunciated by this Court and every Court of Appeals since the adoption of the Federal Rules of

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[8] See *O'Hara* v. *Kovens*, 625 F.2d 15 (4th Cir. 1980), cert. denied, 101 S. Ct. 939 (1981).

Civil Procedure. In *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970), this Court held that "[a]s the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party." 398 U.S. at 157. In *Carter* v. *Stanton*, 405 U.S. 669 (1972), this Court unequivocally stated:

> Under Rule 56, summary judgment cannot be granted unless there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

405 U.S. at 671.

The Courts of Appeals have heretofore unanimously adhered to the views expressed by this Court and the express language of Rule 56(c), Fed. R. Civ. P., holding that summary judgment can only be entered when there exists no genuine issue of material fact. See e.g., *Peckham* v. *Ronrico Corp.*, 171 F.2d 653, 657 (1st Cir. 1948); *Donnelly* v. *Guion*, 467 F.2d 290, 293 (2d Cir. 1972); *Season-All Industries* v. *Turkiye Sise Vie Cam Fabrikalari, A.S.*, 425 F.2d 34, 38 (3d Cir. 1970); *Stevens* v. *Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950); *Winters* v. *Highland Ins. Co.*, 569 F.2d 297, 299 (5th Cir. 1978); *Tee-Pak, Inc.* v. *St. Regis Paper Co.*, 491 F.2d 1193, 1195 (6th Cir. 1974); *Mintz* v. *Mathers Fund, Inc.*, 463 F.2d 495, 498 (7th Cir. 1972); *Ozark Milling Co.* v. *Allied Mills, Inc.*, 480 F.2d 1014, 1015 (8th Cir. 1973); *Federal Deposit Ins. Corp.* v. *First Nat. Finance Co.*, 587 F.2d 1009, 1010-11 (9th Cir. 1978); *Dzenitz* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171-73 (10th Cir. 1974); *Bloomgarden* v. *Coyer*, 479 F.2d 201, 206-07 (D.C. Cir. 1973).

Because summary judgment cannot be granted if there is a genuine issue of material fact, the court's role has been limited merely to identifying genuine issues of material fact (if they exist). The court may not resolve such factual issues. As the Court of Appeals stated in *American Mfrs. Mut. Ins. Co.* v.

American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272 (2d Cir. 1967), *cert. denied*, 404 U.S. 1063 (1972):

> [I]t is a fundamental maxim that on a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried.

388 F.2d at 279.

See, *Ando* v. *Great Western Sugar Co.*, 475 F.2d 531, 535 (10th Cir. 1973).

The Notes of the Advisory Committee on the Federal Rules of Civil Procedure express a further limitation upon courts hearing motions for summary judgment. "Where an issue of fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." 6 Moore's Federal Practice ¶ 56.01[14] at p. 56-22 (1976); *Arnstein* v. *Porter*, 154 F.2d 464 (2d Cir. 1946).

B. The Commencement of the Statute of Limitations Is a Complex Question of Fact Which Ohio Is Entitled to Present to the Jury

Ohio has demanded a trial by jury. Many Courts of Appeals, including the Tenth Circuit, have held in cases arising under the federal securities laws that if there exists any genuine issue of material fact regarding the date on which the applicable statute of limitations begins to run, the plaintiff is entitled to have that issue presented to the jury.[9] In *Dzenitz* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168 (10th Cir. 1974), the Court of Appeals for the Tenth Circuit explained its reversal of a summary judgment order in particularly instructive fashion:

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[9] In contrast, the April 24 opinion below permits the trial judge to resolve genuine issues of material fact as long as the documentary evidence presented by the moving party is "clear and convincing." (A-68).

> While cases involving defenses hinging upon applicable statutes of limitation frequently lend themselves to summary judgment proceedings, *a court should not grant summary judgment for a defendant if there is a viable issue of fact as to when the limitations period began.* 10 Wright and Miller §2734 n. 21 at p. 651; 6 Moore §56.17 (58) at 2171-72 and cases cited at note 10. . . . The important issue is then whether plaintiff or a person in plaintiff's position should reasonably have been apprised of the existence of fraudulent churning activity in the light of routine information she received concerning the active trading in her account. *This issue of constructive knowledge is also one of fact. Stevens* v. *Abbott, supra,* and *Hecht, supra,* recognize that the issue as to *whether the plaintiff in a case such as this is to be charged with knowledge is essentially one of fact subject to determination by the jury or by another trier of fact. It would seldom, if ever, be possible for a judge to determine summarily when the injured person in a case such as this became fully aware that he or she had been victimized. An appraisal of the full testimony is generally called for.*

494 F.2d at 171-72 (Emphasis supplied). The Court of Appeals then applied the following principles:

> Counsel for appellees does not seriously dispute the factual nature of the questions raised. He is content, however, to counter that the plaintiff was negligent; that her failure to exercise ordinary diligence is sufficient to bar her in this case.
>
> *All of the above is factual argument. At most it evidences that the plaintiff was entitled to a trial.* . . . The facts in question are equivocal at best, are clearly matters in dispute, and can only be determined after full development before the fact-finder.
>
> *Where, as here, the issue is essentially a factual one, the case does not lend itself to disposition by summary judgment.* It follows

> that summary judgment was improper and the cause must be reversed and remanded for a trial.

494 F.2d at 172-73 (Emphasis supplied).

In *Robertson* v. *Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), the court reversed a district court's order granting summary judgment based on a statute of limitations defense in an action to recover damages under section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Plaintiff had submitted evidence that he had exercised reasonable diligence in discovering the participation of Seidman & Seidman in the fraud and that Seidman & Seidman had fraudulently concealed their wrongdoing. The Second Circuit concluded that each issue should have been presented to the jury, stating:

> In light of the conflicting inferences which may be drawn from the material facts in this case, we hold that the district court erroneously concluded that summary judgment was proper. The question whether appellant exercised due diligence, and thus is not precluded by the statute of limitations from maintaining this action, is a question of fact that should be determined *by the jury* as a trier of the facts.
>
> * * *
>
> Since we are reversing the summary judgment and remanding the case for trial on all issues of fact, suffice it to say that among the issues to be determined *by the jury*, under proper instructions from the court, is whether there was fraudulent concealment sufficient to invoke the fraudulent equitable tolling doctrine.

609 F.2d at 692, 693 (Emphasis supplied).

In *Johns Hopkins University* v. *Hutton*, 422 F.2d 1124 (4th Cir. 1970), cert. denied, 416 U.S. 916 (1974), the court held that ". . . when, as here, a jury has been demanded and the facts give rise to conflicting inferences on the issue of reasonable diligence, *the question must be submitted to the jury.* [Citations omitted]." 422 F.2d at 1131 (Emphasis supplied). Similary, in *Briskin* v. *Ernst & Ernst*, 598 F.2d 1363 (9th Cir. 1978), the Court of Appeals reversed a district court's order granting summary judgment based upon a statute of limitations defense. Defendants showed that plaintiffs had received several documents indicating that the corporation with which plaintiffs' corporation had merged was not in sound financial condition at the time of the merger. Defendants argued that these documents were sufficient to put plaintiffs on notice of the fraud. The Court of Appeals disagreed, stating:

> Once again, the definition of investor reasonableness here calls for a review of the documents in question *by a trier of fact in light of all the evidence.* A trial judge should not assign conclusive legal effect to such documents at the summary-judgment stage where there can be a genuine difference of opinion as to their impact upon a reasonable person.

589 F.2d at 1368 (Emphasis supplied).[10]

The Court of Appeals also noted the burdens imposed upon a busy court, but concluded:

> [I]t is necessary to place before a fact-finder the conflicting recollections of facts and the conflicting inferences to

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[10] The inherent limitations of a summary judgment proceeding render it an inappropriate vehicle for deciding issues of material fact. In *United States* v. *J. B. Williams Co., Inc.*, 498 F.2d 414 (2d Cir. 1974), the Court recognized that a party opposing summary judgment has the "right" to adduce testimony of live witnesses, rather than rely on affidavits, when a genuine issue of material fact exists. The non-moving party's "right" to full evidentiary hearing exists whether the ultimate trier of fact is the jury or the trial judge. 498 F.2d at 430 n. 19. See also, *Hardin* v. *Pitney-Bowes, Inc.*, 49 U.S.L.W. 3861 (May 19, 1981) (Rehnquist, J., dissenting from denial of petition for writ of certiorari).

> be drawn from such facts in this case. *The conflicting assertions in this case about what a reasonable investor would have known presented issues of the type usually reserved for juries.*

589 F.2d 1369 (Emphasis supplied). See, e.g., *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979), cert. denied sub nom. *Safeway Stores, Inc.* v. *Meat Price Investigators Assoc.*, 101 S. Ct. 280 (1980); *Garnatz* v. *Stifel, Nicholaus & Co., Inc.*, 559 F.2d 1357, 1360 (8th Cir. 1977), cert. denied, 435 U.S. 951 (1978); *Hilton* v. *Mumaw*, 522 F.2d 588 (9th Cir. 1975); *Engl* v. *Berg*, 511 F. Supp. 1146, 1151 (E.D. Pa. 1981).

C. The Court of Appeals' Opinion Below Conflicts With Decisions of This Court and Other Courts of Appeals by Resolving Genuine Issues of Material Fact in Favor of the Parties Seeking Summary Judgment Based Upon a Statute of Limitations Defense, Therby Denying Ohio its Constitutionally Protected Right to Trial By Jury

In the April 24, 1981, opinion below, a panel of the Tenth Circuit did *not* affirm the District Court's opinion on the grounds that there was *no* issue of material fact as to Ohio's diligence and that defendants were entitled to judgment as a matter of law as required by Rule 56. Rather, the Court of Appeals tacitly recognized that factual issues with respect to Ohio's diligence did exist in the record below, but created a new method of summary disposition of such issues which conflicts with existing case law of this Court and other Courts of Appeals. In the April 24 opinion, District Judge Palmieri, sitting by designation and writing for a panel of the Tenth Circuit, opined that "summary disposition is appropriate if the documents before the Court *clearly and convincingly persuade* the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such a time as to bar the action." (A-68) (Emphasis supplied). Such a formulation is predicated upon the existence of factual issues which were to be resolved by the *court* applying a clear and convincing evidence standard.

In attempting to resolve factual issues and decide this case on the merits of defendants' statute of limitations defense without the benefit of a record fully developed at trial, the April 24 opinion inevitably contains and relies on erroneous factual conclusions as to which there is persuasive contradictory evidence. Rather than view the contradictory evidence in a light most favorable to Ohio, the non-moving party, the Court of Appeals totally ignores it. By way of example, the April 24 opinion gives conclusive legal effect to the fact that other plaintiffs named Lowry and the Firm as defendants in various lawsuits concerning KRC. (A-60). The Court notes that other plaintiffs had perceived Lowry's "possible role in the alleged fraud." (A-60). Yet, the Court of Appeals ignores the affidavits of Ohio's former counsel who sought out such "other plaintiffs" and discovered that they had no actual information which indicated that Ohio had a claim for relief against Lowry or his firm.[11]

Another factual conclusion of the Court of Appeals is contradicted by evidence submitted by Ohio to the District Court. The April 24 opinion relies upon a handwritten note from the Ohio Attorney General's files by Richard N. Patterson, then an assistant attorney general, which refers to Lowry as "active in the inflation." (A-60). The Court of Appeals then "presumes" that the note is a reference to the "fraudulent inflation of KRC's stated assets." (A-60). Under Rule 56 the Court is not free to presume facts that are not in evidence. It is the moving party's burden to demonstrate that no material issue of fact exists and a court cannot aid that party by making presumptions favorable to it. *Adickes* v. *S.H. Kress and Co.*, 398 U.S. 144

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[11] The Court of Appeals' reference to "the alleged fraud" mischaracterizes the facts and circumstances which led to the filing of numerous lawsuits by other plaintiffs. In fact, numerous *different* frauds were perpetrated. The Court of Appeals ignores the fact that the different factual situations giving rise to the other lawsuits filed against Lowry and the Firm in no way suggested that they had participated in a fraud "in connection with" Ohio's purchase of KRC's promissory notes. (A-2 to A-3).

(1970). The Court of Appeals' presumption in the April 24 opinion is directly contradicted by the sworn affidavit of Mr. Patterson:

> The information suggesting the culpability of Mr. Lowry and his firm later developed in Ohio v. Crofters, Inc., discovery depositions was not then known. I am aware of no facts known to the attorney general's office during my tenure indicating that Mr. Lowry or his firm had actual responsibility for Ohio's loss. Certainly, I was aware of none.

Sworn testimony in the court below contradicts the inference which the Court of Appeals chose to draw from a partially unreadable, cryptic note.

A third factual conclusion reached by the Court of Appeals is contradicted by the record. The court concludes as a factual matter that the KRC bankruptcy trustee's proposed Complaint in *Baer* v. *Franklin Supply Company*, filed in the bankruptcy proceeding on August 21, 1973, "alleged that Lowry and the firm had conspired to defraud KRC of 1.1 million dollars from December of 1968 through October of 1970—the period during which Ohio had purchased its KRC notes." (A-61). The record below establishes, however, that the allegations of the *Baer* complaint with respect to Lowry and the Firm would not constitute the basis for a securities action by Ohio against these parties in connection with Ohio's April and May 1970 purchases of KRC notes.

In the Answers of Timothy G. Lowry to Plaintiff's First Interrogatories Directed to Timothy G. Lowry in this action, Lowry confirms Ohio's conclusion when he states that "no transaction between King Resources and the Franklin Supply Companies related to the State of Ohio transaction."

Fourth, the Court of Appeals concludes that the record below would support a finding of *actual* discovery by Ohio of

Lowry's involvement in the fraud as of August, 1973. (A-70 n. 16). Again, such a conclusion requires that the Court of Appeals disregard contrary factual evidence. The persons responsible for Ohio's investigation of the KRC matter have testified by affidavit that they did *not* have *actual* knowledge of Lowry's involvement in the fraud, and on a motion for summary judgment the court may not refuse to believe or simply ignore that evidence. The weighing of the evidence is the task of the jury.

The affidavits of Eugene F. McShane, Assistant Attorney General in the Office of the Attorney General of Ohio, Richard North Patterson, Ronald J. Coffee, and Joel E. Wesp all state that prior to the January 5, 1976, deposition of Timothy Lowry, Ohio had no information suggesting that Lowry or the Firm bore responsibility for Ohio's loss. Indeed, Richard F. Stephens of the firm of Baker and Hostetler, special counsel to the Attorney General of the State of Ohio from September 1972, until May 1975, testified by affidavit in the court below that:

> During my representation of the State of Ohio in the Crofters case and during the discovery which our firm and the Attorney General's Office conducted in that case, to the best of my recollection and belief I did not discover or otherwise come to know any information or facts which indicated that Timothy G. Lowry or his former law firm knew of or participated in any fraud upon Ohio. In addition, to the best of my recollection and belief, no such information was known to anyone in the Attorney General's Office or my firm during my tenure as Special Counsel. If we had known of Mr. Lowry's participation in or knowledge of any fraud against Ohio, we would have recommended to Ohio that Timothy Lowry be joined as a defendant in the Crofters case or that a separate action be brought against him.

Petitioner is aware of *no* decisions in which *any* federal court has resolved a motion for summary judgment by weighing contradictory evidence and applying a "clear and convincing evidence" standard. Indeed, as noted above, there are innumerable decisions of this Court and other Courts of Appeals which directly prohibit the summary disposition procedure created in the opinion below. The decision of the Court of Appeals below is such a serious departure from the accepted and legally permissible course of judicial proceedings as to require the exercise of this Court's supervisory powers.

II. The Decision Below Directly Conflicts with Decisions Of The Courts Of Appeals For The Second And Seventh Circuits By Rejecting The Principle That Active Concealment Of An Individual's Role In A Fraud Tolls The Statute Of Limitations Until Plaintiff's Actual Discovery Of The Individual's Wrongdoing.

The decision below acknowledged, but expressly refused to follow, decisions of the Courts of Appeals for the Second and Seventh Circuits which hold that an individual's fraudulent concealment of his wrongdoing tolls the statute of limitations until plaintiff's *actual* discovery of the fraudulent conduct of the opposing party. (A-69 to A-70).

In *Tomera* v. *Galt,* 511 F.2d 504 (7th Cir. 1975), an action brought under section 10(b) of the Securities Exchange Act of 1934, the district court dismissed the plaintiff's claims as time-barred. The Court of Appeals reversed, however, noting that the plaintiff had alleged fraudulent concealment by defendants. With respect to the showing needed to toll the statute of limitations, the Court of Appeals held that:

> At least two types of fraudulent behavior toll a statutory period. Bailey v. Glover, 21 Wall. 342, 22 L.Ed. 636

> (1875). In the first type, the most common, the fraud goes undiscovered even though the defendant after commission of the wrong does nothing to conceal it and the plaintiff has diligently inquired into its circumstances. The plaintiff's due diligence is essential here. [Citations omitted.] *In the second type, the fraud goes undiscovered because the defendant has taken positive steps after commission of the fraud to keep it concealed.* [Citations omitted.] This type of fraudulent concealment tolls the limitations period until *actual* discovery by the plaintiff.

511 F.2d at 510 (Emphasis supplied). *See also, Goldstandt* v. *Bear, Stearns & Co.,* 522 F.2d 1265, 1268 (7th Cir. 1975).

The decision below also directly conflicts with a recent decision of the Court of Appeals for the Second Circuit. In *Robertson* v. *Seidman & Seidman*, 609 F. 2d 583 (2d Cir. 1979), the court held:

> Under the federal equitable tolling doctrine, the active concealment of fraudulent conduct tolls the statute of limitations in favor of the defrauded party until such time as he actually knew of the fraudulent conduct of the opposing party.

609 F.2d 593.

If the holdings of the Seventh and Second Circuits were followed by the Court of Appeals for the Tenth Circuit,[12]

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[12] If defendants herein had been sued where they reside (Chicago, Illinois), the decisions of the Court of Appeals for the Seventh Circuit regarding the doctrine of fraudulent concealment would have governed the disposition of defendants' motions. In our view, the law as applied by the Seventh Circuit would have mandated a denial of defendants' motions. Mr. Justice White has expressed the view, in a different factual context, that a petition for a writ of certiorari should be granted to resolve conflicting interpretations of federal law by the Courts of Appeals. *Ransom* v. *United States,* 434 U.S. 908 (1977). See also, Stern & Gressman, *Supreme Court Practice,* pp. 268-69 (5th ed. 1978).

Ohio's claims against Lowry and the Firm would not have been barred by the statute of limitations. The rule of law adopted by the Tenth Circuit unfairly penalizes a defrauded party and encourages wrongdoers to conceal their fraudulent acts. Certiorari should be granted to resolve this direct conflict between decisions of the Second and Seventh Circuits and the Tenth Circuit.

III. The Decision Below Conflicts With This Court's Recent Decision In *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), Which Would Require That The Law Of Colorado Concerning Tolling Of The Statue Of Limitations Be Applied In Determining Whether Ohio's Action Is Untimely

A number of federal courts have held that in actions brought under the federal securities laws, the federal courts, although applying the state limitation period applicable to the most closely analogous state law action, should apply federal common law to determine when the limitation period began to run. See, *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *Phillips* v. *Levie*, 593 F.2d 459 (2d Cir. 1979); *Holmes* v. *Bateson*, 583 F.2d 542 (1st Cir. 1978); *Tomera* v. *Galt*, 511 F.2d 504 (7th Cir. 1975); *deHaas* v. *Empire Petroleum Co.*, 435 F.2d 1123 (10th Cir. 1970).

In May, 1980, this Court in *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980), held that when a federal court applies an analogous state statute of limitations to a federal substantive claim created by Congress, the entire state law should logically be applied, including the state statutes and court decisions concerning the tolling of the limitation period—except when this would prove inconsistent with the federal policy underlying the federal cause of action under consideration. In so holding, this Court quoted approvingly the following language in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975):

> Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interest in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

421 U.S. at 463-464.

While the federal cause of action under consideration in *Tomanio* was a civil rights action, Ohio submits that the reasoning in the decision applies with equal force to securities fraud actions. *Aldrich* v. *McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 (10th Cir. 1980). Indeed, the Fourth Circuit in *O'Hara* v. *Kovens*, 625 F.2d 15 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 939 (1981), recently relied upon *Tomanio* and *Johnson* v. *Railway Express Agency, Inc.* in deciding that state tolling provisions applied to an interpretation of the relevant state statute of limitations in a federal securities action. Yet, the Court of Appeals in the decision below refused to interpret *Tomanio* as applying to actions under the federal securities laws. (A-62 to A-64).

In cases where an individual actively conceals his fraudulent conduct, the law of Colorado clearly would toll the applicable statute of limitations until the plaintiff *actually* discovers the individual's wrongdoing. In *Rogers* v. *Rogers*, 96 Colo. 473, 44 P.2d 909 (1935), the defendant argued that plaintiff's claim was barred by the statute of limitations.[13] Plaintiff argued that defendant's statements, made to conceal his fraud, tolled the statute until defendant actually discovered her cause of action. The Colorado Supreme Court held that the statute was tolled until actual discovery of the fraud by plaintiff.

> If defendant, as plaintiff alleges, by false statements which plaintiff believed, kept her in ignorance of the true facts so that she did not discover the conversion of the note until 1932, as to her the statute of limitations should not and would not begin to run in favor of the defendant, who had concealed the true facts from her, until she discovered the truth.

96 Colo. at 477, 44 P.2d at 910-11.

By refusing to apply the Colorado tolling rule to Ohio's claims under the federal securities laws, therefore, the Tenth Circuit prejudiced Ohio's ability to assert a claim against Lowry and the Firm.[14] This court should grant *certiorari* to determine whether the *Tomanio, supra,* rule applies in actions brought under section 10(b) of the Securities Exchange Act of 1934.

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[13] In its April 24 opinion, the Court of Appeals incorrectly suggests that to apply Colorado law regarding the tolling of the statute of limitations it would have to rely on medical malpractice cases. (A-63 to A-64). In fact, the *Rogers, supra,* case relied on herein and before the Court of Appeals involves the fraudulent conversion of a note, an action more closely related to Ohio's claims in this action. In any event, the Court of Appeals gives no explanation why such cases applying state law are more reliably applied to civil rights actions, as required by this Court's decision in *Tomanio, supra,* than to securities fraud cases as required by the Fourth Circuit in *O'Hara* v. *Kovens, supra*.

[14] As noted above, the Court of Appeals below acknowledged, but rejected, decisions of other Courts of Appeals which had interpreted the

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federal tolling doctrine as tolling the statute of limitations until plaintiff's *actual* discovery of an individual's fraudulent conduct when such individual actively concealed his fraudulent conduct.

CONCLUSION

For the reasons stated hereinabove, this Court should issue its Writ of Certiorari to the Court of Appeals for the Tenth Circuit so as to permit this Court to review that Court's April 24, 1981 opinion.

Respectfully submitted,

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APPENDIX

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b):

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 27 of the 1934 Act, 15 U.S.C. § 78aa:

JURISDICTION OF OFFENSES AND SUITS

Sec. 27. The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5:

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange,

(1) to employ any device, scheme or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

COLORADO REVISED STATUTE § 13-80-109

Relief on ground of fraud—3 years:

Bills for relief on the ground of fraud shall be filed within 3 years after the discovery by the aggrieved party of the facts constituting such fraud, and not afterwards.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 76-F-992

STATE OF OHIO,
Plaintiff,

v.

PETERSON, LOWRY,
RALL, BARBER & ROSS, a
partnership, et al.,
Defendants.

ORDER GRANTING DISMISSAL

I.

Plaintiff State of Ohio has brought this suit against the defendant law partnership and its individual partners, and bases its claim upon an alleged violation of the federal securities laws, Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), Section 10b of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Section 20 of the Securities Exchange Act, 15 U.S.C. § 78(t). Plaintiff has also claimed violations of pendent common law duties against fraud and negligent misrepresentation. The claims for relief arise out of plaintiff's purchases of King Resources Company 9-½% notes in April and May of 1970. Defendants have filed motions to dismiss in which they contend that the action is barred by the applicable statute of limitation. For the reasons stated below we grant the motions.

According to the complaint, the purchases here involved were accomplished on April 17, 1970 ($3,000,000 note purchased) and May 1, 1970 ($5,000,000 note purchased). This action was commenced on October 7, 1976 by the filing of the complaint. Fed. R. Civ. P. 3. Since there is no federal limitation period assigned to the securities laws, the applicable statute of limitation is that "of the forum state in which the alleged prohibited acts occurred." *deHaas v. Empire Petroleum Company*, 435 F.2d 1223 (10th Cir. 1970). The relevant limitation period in Colorado has been reviewed by this court and the Tenth Circuit on a number of occasions. In *Trussell v. United Underwriters, Ltd.*, 228 F. Supp. 757 (D. Colo. 1964), Judge Doyle held that the three year limitation applicable to fraud actions was appropriate. This limitation period was again applied in *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968) and affirmed by the Tenth Circuit Court of Appeals, 435, F. 2d 1223 (10th Cir. 1970). *See also Vanderboom v. Sexton*, 294 F. Supp. 1178 (W.D. Ark. 1969), citing *Trussell*.

Using the three year period the suit normally would have to be brought before May of 1973, three years after the complained of transaction took place. While the statute of limitation is supplied by Colorado state law, "it is a matter of federal law as to the circumstances that will toll a state statute applied to private actions under the securities laws." *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir. 1968). Under federal law the doctrine of equitable tolling becomes important. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). In the *Holmberg* case, the Supreme Court announced that:

> where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.

The equitable tolling doctrine has been applied to federal securities fraud cases. *E.g.*, *Seiffer v. Topsy's International, Inc.*, 520 F.2d 795 (10th Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *Lamb v. United Security Life Co.*, 59 F.R.D. 44 (S.D. Iowa 1973).

Under the tolling doctrine we must determine whether in the exercise of due diligence plaintiff should have discovered defendants' fraud, if any, prior to October 7, 1973—three years before this action was commenced.

In moving for dismissal under Rule 12 of the Federal Rules of Civil Procedure, defendants Peterson, Ross, Rall, Barber & Seidel noted that plaintiff had filed a similar securities action on April 17, 1972 in the Southern District of Ohio. Defendants appended that complaint to their brief as an attachment.* A reading of the complaint indicates that it involves the very transactions considered in the instant case and is based on a claimed violation of the same statutes. Ohio v. Crofters, *et al.*

Parenthetically, we observe that the case filed in the Southern District of Ohio in April was transferred to this court in November of 1972 by the Judicial Panel on Multidistrict Litigation. 352 F. Supp. 975 (JPML 1972). The *Crofters* case was then consolidated with other related cases wherein defendants here were named defendants. At the time the *Crofters* case was received by this court, the following cases, involving securities fraud of King Resources Company were already pending in this district; *Bottger v. King Resources Company*, C-3873 (class action); *Licker v. King Resources Company*, C-3981; *Morell v. John M. King*, C-3980; *Dietrich v. King Resources Company*, C-3424 (class action); *Imperial American Funds Reorganization*, 72-B-556; *Itin v. The Denver Corporation*, C-2963; *King Resources* Reorganization, 72-B-2921; *The Colorado Corporation Bankruptcy*, 71-B-1216.

In its Memorandum in Opposition plaintiff admits that it had knowledge of the *Bottger* and *Dietrich* class actions in which defendants here were named (or at best, plaintiff does not deny knowledge). In response, plaintiff insists that defendants here "steadfastly denied any liability" in those cases. This explanation is offered to negate the argument that in exercising due diligence plaintiff should have discovered defendants' role in the securities transaction.

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*By including the April 17, 1972 complaint in its brief, and alluding to that case and others in their argument, defendants presented matters outside the pleadings. Plaintiff responded to the complaint and arguments in its February 25, 1977 Memorandum in Opposition.

Plaintiff also asserts that it was not aware of certain liability-evincing facts until a 1976 deposition in the *Crofters* case. The determinative factor, however, is not when plaintiff *actually* learned of defendants' connection with the securities transaction, but when the exercise of due diligence, plaintiff should have discovered the connection. As stated by the Supreme Court in *Holmberg, supra*, the statute is tolled only when the plaintiff "remains in ignorance" of the fraud "without any fault or want of diligence or care on his part."

A situation similar to the instant case was presented in *Klein v. Bower*, 421 F.2d 338 (2d Cir. 1970). In *Klein*, plaintiff-appellant had, in 1961, brought an action in state court against the same defendants alleging conversion and fraud in connection with a certain securities transaction. Judgment in the state action was adverse to the plaintiff. In 1968 plaintiff filed a suit in the United States District Court for the Southern District of New York. The federal suit claimed violations of Section 7 of the Securities Exchange Act, 15 U.S.C. § 78g and a series of state fraud offenses. The Second Circuit Court of Appeals noted that plaintiff could have stated a federal fraud claim under Section 10b of the 1934 act, 15 U.S.C. § 78j(b), as has the State of Ohio in this case. The court further noted that the Section 10b claim would fall within the same statute of limitation analysis as the Section 7 claim there considered. 421 F.2d at 343 n.4.

In their statute of limitations defense defendants noted that the state case and the federal case involved the same transaction. Defendants there contended that had plaintiff exercised due diligence he would have discovered the alleged fraud at the time of the earlier filing. Plaintiff responded by stating that he did not discover until "after the state trial in 1966 the full enormity of [defendant's] operation" and certain other specific facts. 421 F.2d at 343.

The Second Circuit rejected this argument, observing that the plaintiff-appellant had sufficient knowledge at the time of the 1961 state court filing to put him on notice of any fraud. Therefore, said the court, "the statutory period began to run then and did not await appellant's leisurely discovery of the full details of the alleged scheme." *Id.* The court further distinguished cases in which the tolling period of the statute could only be ascertained after submission to a jury; the court noted that had the facts been as plaintiff-appellant stated them, the action would still be barred.

The instant case presents close parallels to *Klein v. Bower*. Here plaintiff filed a securities fraud case in 1972 involving the same securities transaction. Plantiff defends this late filing against defendants on the basis of certain details "discovered" only recently. Plaintiff admits in its Memorandum in Opposition that defendants here were defendants in related securities fraud class action cases at the time the 1971 case was filed. Taking these facts in a light most favorable to plaintiff, we conclude, as did the Second Circuit in *Klein* that there exists no triable issue of fact on the question of due diligence. In 1972 other plaintiffs were suing defendants here on virtually the same claim for relief. Plaintiff here was aware of those suits, but states that in exercising due diligence it would not have discovered the Peterson, Lowry-partnership connection because "Mr. Lowry and his partners den[ied] liability" in those cases. Memorandum in Opposition at 5.

In our assessing the meaning of due diligence this court gives some weight to the amount in controversy and the legal sophistication of the party involved. In this case, the State of Ohio is obviously more than a casual dabbler in the securities market. The size of the claim alone ($8,000,000 plus exemplary damages) implies that great care and diligence is required in pursuing the claim. Nonetheless, even disregarding these factors, the court would still conclude that plaintiff did not "remain in ignorance of [the fraud] without any fault or want of diligence or care." *Holmberg, supra*. Instead, plaintiff's failure to sue the defendant-partnership in a more timely fashion is due to a clear lack of diligence. Thus, the doctrine of equitable tolling is inapplicable to this litigation. The claim was not filed in a timely manner and is therefore barred by the statute of limitations.

II.

Plaintiff has argued that the court cannot dismiss at this juncture since the question of due diligence is one for a jury to determine. While it may be true that statute of limitations questions are often reserved for a jury, it does not follow that the law requires them to be so treated. Quite the contrary is true. The Tenth Circuit, in *Dzentis v. Merrill, Lynch, Pierce Fenner & Smith*, 494 F.2d 168, 171 (10th Cir. 1974), stated that "cases involving defenses hinging upon applicable statutes of limitation frequently lend themselves to summary judgment proceedings."

In *Chiodo v. General Waterworks Corp.*, 380 F.2d 860 (10th Cir. 1976) the court affirmed Judge Christensen's decision to take the statute of limitation question from the jury and enter judgment for defendants. Finally, in *Klein v. Bower* the Second Circuit approved the trial court's determination which arose upon defendants' motion to dismiss under Rule 12 and motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Securities claimants confronted with defenses based on statutes of limitation enjoy no special benefits when motions to dismiss are propounded. Plaintiffs cannot rely upon the stage of the proceedings for protection, but must overcome the legal arguments presented against their case. The true issue is simply whether, taking the facts and allegations presented in a light most favorable to the plaintiff, whether any triable issue of fact remains. *See*, *Klein v. Bower*, *supra* at 344. As stated previously, plaintiff's failure to sue the defendant-partnership and its partners in a more timely fashion is due to a clear lack of diligence. There exists, in the context of this case, no question of fact to be determined by the jury. The tolling doctrine does not apply and the claim is barred.

III.

Plaintiff has asserted two state law claims and relies on the pendent jurisdiction of the court to supply our authority to hear the matters. Since we have determined that the federal claims are not cognizable by the court, we decline to exercise jurisdiction over the pendent claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966); *Umdenstock v. American Mortgage & Investment Co.*, 495 F.2d 589 (10th Cir. 1974).

ORDER

Defendants' Peterson, Ross, Rall, Barber & Seidel's Motions Pursuant to Local Rule 4(C) for Leave to File Briefs, filed on January 31, 1977 and March 18, 1977, are GRANTED.

The motions of defendants Timothy G. Lowry and Peterson, Ross, Rall, Barber & Seidel, et al., to dismiss the complaint, both filed on January 31, 1977 are GRANTED. Plaintiff's complaint and cause of action are are dismissed.

This memorandum opinion and order constitute our findings of fact and conclusions of law.

DATED at Denver, Colorado this 25 day of March, 1977.

BY THE COURT:

SHERMAN G. FINESILVER, Judge
United States District Court

STATE OF OHIO, Plaintiff-Appellant,

v.

PETERSON, LOWRY, RALL, BARBER
& ROSS, et al., Defendants-Appellees.

No. 77-1374.

United States Court of Appeals,
Tenth Circuit.

Submitted Aug. 9, 1978.

Decided Oct. 18, 1978.

Rehearing Denied Nov. 7, 1978.

State of Ohio brought an action against law partnership and the individual members thereof, alleging that defendants, in connection with Ohio's purchase of two promissory notes of a company for which defendants were outside counsel, had misrepresented the financial standing of the company and that Ohio had relied thereon to its detriment. The United States District Court for the District of Colorado, No. 76—F—992, Sherman G. Finesilver, J., granted defendant's motions to dismiss the action, and plaintiff appealed. The Court of Appeals, McWilliams, Circuit Judge, held that where the trial court had under consideration a motion to dismiss for failure to state a claim based on the statute of limitations, and where there was matter outside the complaint that was presented to the court and not excluded, and in fact was taken into consideration by the court, the motion would be deemed a motion for summary judgment, and in such circumstances, the trial court should have given the parties notice of the changed status of the motion and thereby provided them with the opportunity to present all material pertinent to such motion under the summary judgment rule.

Reversed and remanded.

1. Federal Civil Procedure 2533

Where the trial court had under consideration a motion to dismiss for failure to state a claim based on the statute of limitations, and where there was matter outside the complaint that was presented to the court and not excluded, and in fact was taken into consideration by the court, the motion would be deemed a motion for summary judgment; and in such circumstance, the trial court should have given the parties notice of the changed status of the motion and thereby provided them with the opportunity to present all material pertinent to such motion under the summary judgment rule. Fed.Rules Civ.Proc. rules 12(b)(6), 56, 28 U.S.C.A.

2. Federal Civil Procedure 2533

Mere argument contained in a memorandum in opposition to a motion to dismiss is not the same as "material made pertinent" by a motion for summary judgment; the material made pertinent by the summary judgment rule includes such things as depositions, answers to interrogatories, admissions on file, affidavits, and the like. Fed.Rules Civ. Proc. rules 12(b), 56, 28 U.S.C.A.

3. Federal Civil Procedure 2533

To treat a motion to dismiss as a motion for summary judgment without permitting the adverse party an opportunity to present pertinent materials is error. Fed.Rules Civ. Proc. rules 12(b), 56, 28 U.S.C.A.

J. Vernon Patrick, Jr., Birmingham, Ala. (Richard North Patterson, Berkowitz, Lefkovits & Patrick, Birmingham, Ala., Eugene F. McShane, Chief, Sp. Litigation Section, Columbus, Ohio, Harry L. Hobson, Luke J. Danielson and Miles M. Gersh, Holland & Hart, Denver, Colo., on brief), for plaintiff-appellant.

Robert H. Wheeler, Chicago, Ill. (Donald J. McLachlan, Thomas G. Ryan, Chicago, Ill., of counsel: Isham, Lincoln & Beale, Chicago, Ill., and Jeffrey A. Hyman, Denver, Colo., on brief), for all defendants-appellants except Timothy G. Lowry.

Raymond J. Connell, Denver, Colo. (Donald M. Haskell and Gerald M. Miller, Chicago, Ill., of counsel: Haskell & Perrin, Chicago, Ill., and Yegge, Hall & Evans, Denver, Colo., on brief), for defendant-appellee, Timothy G. Lowry.

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is an appeal by the plaintiff from an order of the trial court granting the defendants' motions to dismiss for failure to state a claim and entering judgment dismissing the cause of action. The basis for the trial court's action was that the applicable statute of limitations barred the action. The plaintiff now appeals the dismissal order. We reverse.

On October 7, 1976, the State of Ohio brought an action in the United States District Court for the District of Colorado against a Chicago, Illinois law firm and the individual members thereof, that firm being outside counsel for King Resources Company. Ohio alleged in its complaint that on April 17, 1970, it purchased a promissory note of King Resources Company in the amount of $3,000,000, and that on May 1, 1970, it purchased a second promissory note in the amount of

$5,000,000 of King Resources Company. The gist of the claim was that in connection with Ohio's purchase of these two notes, the defendants had misrepresented the financial standing of King Resources Company, and that Ohio had relied on such representations to its detriment. There were additional allegations that the defendants, or certain of them, had concealed their "violative conduct" to the end that Ohio had not discovered such until within the year next preceding the filing of the complaint. Jurisdiction was based on Section 22(a) of the Securities Act of 1933, as amended, 15 U.S.C. § 77v(a), Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78aa and upon the principles of pendent jurisdiction.

The defendants filed motions to dismiss based on a failure to state a claim upon which relief could be granted. Specifically, the motions to dismiss stated, *inter alia,* that the cause of action was barred by the applicable statute of limitations.* The motion pointed out that Ohio purchased the two promissory notes of King Resources Company in April and May, 1970, and had not brought the present action until October 7, 1976.

The defendants' motions to dismiss were not supported by any affidavits. However, the defendants did file a memorandum brief in support of their motions to dismiss, and attached to such memorandum a copy of a complaint filed by Ohio in the United States District Court for the Southern District of Ohio on April 17, 1972. This complaint pled a cause of action based on Ohio's purchase of the same two promissory notes of King Resources Company which form the basis for the present proceeding. The action in the Southern District of Ohio was against one Crofters and others, and the defendants in the present proceeding were not defendants in the Ohio proceeding.

Pursuant to order of court, the State of Ohio thereafter filed a memorandum in opposition to the motions to dismiss. In its memorandum Ohio stated that it was treating the defendants' motions to dismiss as being just that, i.e., motions to dismiss and not as motions for summary judgment. In resisting the defendants' motion to dismiss, it was Ohio's basic position, as pled in its complaint, that it had not learned of the involvement of the present defendants until the year next preceding the commencement of the present action.

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*The trial court applied a 3-year statute of limitations.

The trial court, acting on the basis of the motions to dismiss and the memoranda in support of, and in opposition to, such motions, granted the motions and dismissed the action. In thus acting, the trial court held that the 3-year statute of limitations had run and that there had been no equitable tolling of the statute since "plaintiffs' failure to sue the defendant-partnership in a more timely fashion is due to a clear lack of diligence." In this connection the trial court in its dismissal order made reference to the complaint filed by Ohio in the Southern District of Ohio on April 17, 1972, which, as indicated, had been attached by the defendants in the present proceeding to their memorandum in support of their motions to dismiss. The trial court recognized that such attachment concerned matter "outside the pleadings," but added that Ohio had "responded" to such in its memorandum. It would appear that in reaching the conclusion that the statute of limitations had run, the trial court attached considerable importance to the fact that Ohio, in 1972, had brought suit in connection with the same promissory notes which formed the basis for the present action.

The State of Ohio later filed a timely motion to reconsider, pointing out, *inter alia,* that it had at all times treated the defendants' motions to dismiss as being only that, and it had not understood that they were to be treated as motions for summary judgment. In this latter regard Ohio noted that in dismissing the action the trial court went beyond the allegations in the complaint, and "looked elsewhere" in reaching its conclusion. This motion for reconsideration was denied, and the present appeal followed.

The several motions to dismiss filed by the defendants in the instant case were filed pursuant to Fed.R.Civ.P. 12(b). The specific matter urged as ground for dismissal was that Ohio's complaint failed to state a claim upon which relief could be granted because the action was barred by the statute of limitations. In this connection Rule 12(b) provides, in part, as follows:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Although there is a contrary suggestion by counsel, it is quite apparent to us that the trial court did not ground its order of dismissal on a belief that the complaint, on its face, showed that the claim was barred by the statute of limitations. Indeed the trial court in its order made specific reference to matter "outside the pleadings," and a reading of the dismissal order indicates that the trial judge most definitely did consider such matter in arriving at his finding and conclusion that the plaintiffs had not used due diligence and that the doctrine of equitable tolling was not available. Clearly, then, the trial court, though it did not say so in so many words, was treating the motions to dismiss as motions for summary judgment. In such circumstance there must then be compliance with Rule 56. In this general regard, see 5 Wright and Miller, *Fed. Practice and Procedure,* § 1366, p. 683, where appears the following pertinent comment:

> As soon as a motion to dismiss under Rule 12(b)(6) is

> converted into a motion for summary judgment, the requirements of Rule 56 become operable. It is important that the court give the parties notice of the changed status of the motion and a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." In this way no one will be taken by surprise by the conversion. Once the proceeding becomes one for summary judgment, the moving party's burden changes and he is obliged to demonstrate that there exists no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law.

For Tenth Circuit cases in accord with the general rule set forth immediately above, see, for example, *Adams v. Campbell County School District,* 483 F.2d 1351, 1353 (10th Cir. 1973) and *Miller v. Shell Oil Co.,* 345 F.2d 891, 893 (10th Cir. 1965). In the *Miller* case, at p. 893, appears the following comment:

> Under Rule 12(b), F.R.Civ.P., a defendant may raise an affirmative defense by a motion to dismiss for the failure to state a claim. If the defense appears plainly on the face of the complaint itself, the motion may be disposed of under this rule. But, if the affirmative defense is based upon matters outside the complaint, and is raised by a motion under Rule 12(b), then the court must consider the motion as one for summary judgment under Rule 56 in order to consider evidentiary matters outside the complaint. And, then, only if there is no genuine issue of fact as to the affirmative defense, can the court sustain the motion to dismiss.

The ultimate question in the instant case is whether the trial court complied with the requirements of Rule 56 concerning summary judgments. We conclude that there was no such compliance, and it is on this basis that we reverse.

[1-3] Where, as here, a trial court has under consideration a motion to dismiss for failure to state a claim based on a

statute of limitations, and there is matter outside the complaint which is presented to the court and not excluded, and in fact is to be taken into consideration by the court, the motion is to be deemed as a motion for summary judgment. In such circumstance the trial court should give the parties notice of the changed status of the motion and thereby provide the parties to the proceeding the opportunity to present to the court all material made pertinent to such motion by Rule 56. In this regard we do not deem mere argument contained in a memorandum in opposition to a motion to dismiss, such as Ohio filed in the instant case, to be the same as "material made pertinent" by a motion for summary judgment. The material made pertinent by Rule 56 includes such things as depositions, answers to interrogatories, admissions on file, affidavits, and the like. As above indicated, in the instant case there was no compliance with Rule 12(b) and Rule 56, and for that reason we must reverse. As we stated in *Adams v. Campbell County School District*, 483 F.2d 1351, 1353 (10th Cir. 1973), to treat a motion to dismiss as a motion for summary judgment without permitting the adverse party an opportunity to present pertinent material is error.

By resolving the present controversy on a procedural basis we do not wish to be understood as indicating either that the case can, or cannot, be finally determined after there has been compliance with Rule 56. In *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir. 1974) we recognized that cases involving defenses hinging on applicable statutes of limitations on occasion do lend themselves to summary judgment. At the same time we also noted that a trial court should not grant summary judgment for a defendant if there is a "viable issue of fact" as to when the limitations period began. Whether in the instant case there remains a viable issue of fact after there has been a compliance with Rule 56 depends on the material which is presented to the trial court by the parties.

Judgment reversed and case remanded with direction that Ohio's action be reinstated, further proceedings to be consonant with the views herein expressed.

STATE OF OHIO, Plaintiff,

v.

PETERSON, LOWRY, RALL, BARBER & ROSS, a partnership, Peterson, Ross, Rall, Barber & Seidel, a partnership, Timothy G. Lowry, Herbert C. Loth, Jr., Abe R. Peterson, Owen Rall, Henry P.C. W. Barber, Richard V. Henry, Jr., Gerhard E. Seidel, J. Hayden MacDonald, Elroy C. Sandquist, Jr., Irving G. Swenson, Robert G. Schloerb, Theodore J. Tsoumas, J. Robert Geiman, Thomas K. Peterson, John G. Campbell, Peter M. Sfikas, Robert S. Milnikel, Richard S. Borland, and Russell M. Pleton, Jr., Defendants.

Civ. A. No. 76-F-992

United States District Court,
D. Colorado.

June 18, 1979.

State of Ohio brought action against law firm, its successor in interest, and individual partners of firm, alleging that defendants had violated provisions of federal and state law, and defendants filed motions to dismiss. The District Court, Sherman G. Finesilver, J., held that: (1) governing statute of limitations was three years for each of the claims advanced by state of Ohio; (2) although limitations period was supplied by law of Colorado, circumstances which could toll running of statute of limitations were matters of federal law; (3) state of Ohio should, as a matter of law, have become aware of defendants' alleged involvement not later than August 21, 1973, date on which trustee in reorganization of corporation filed application with court for permission to file suit against defendants, and thus suit was barred because it was not filed until October 7, 1976; (4) element of fraudulent concealment was inapplicable.

Defendants' motion for summary judgment granted.

1. Securities Regulation 134

Suit brought under antifraud provisions of federal securities laws was governed by three-year Colorado statute of limitations applicable to comparable actions arising under Colorado Securities Act. C.R.S. '73, 11-51-101 to 11-51-129, 11-51-123, 13-80-106, 13-80-108(1)(a, b), 13-80-109; Securities Act of 1933, § 17, 15 U.S. C.A. § 77q.

2. Federal Courts 427

Though limitations period in suit brought under federal securities law was supplied by Colorado law, circumstances which would toll running of statute were matters of federal law.

3. Securities Regulation 134

Federal rule applicable in suit brought under federal securities laws is that statute of limitations does not begin to run until the plaintiff knew or, in the exercise of due diligence, should have known of the alleged fraud; focus of inquiry under equitable tolling doctrine is the plaintiff, and the question is whether the plaintiff exercised due diligence in becoming aware of the wrong.

4. Limitation of Actions 100(1), 104(1)

Where fraud goes undiscovered because defendant has taken positive steps, after commisiion of the wrong, to keep it concealed, focus of inquiry shifts from plaintiff's diligence to defendant's conduct, and defendant's conduct with toll limitations period, without any special concern as to plaintiff's due diligence, until such time as plaintiff actually discovers the underlying wrong; this is known as "fraudulent concealment."

See publication Words and Phrases for other judicial constructions and definitions.

5. Limitation of Actions 55(3)

Where state of Ohio, which had purchased two promissory notes from corporation, filed suit against corporation and others in 1972, where, on August 21, 1973, trustee in corporation's reorganization filed application with the court for permission to file suit against certain of the corporation's attorneys and where state of Ohio was a creditor in the reorganization proceedings, Ohio's cause of action against the attorneys accrued no later than last date of purchase of promissory notes in 1970 and state, in the exercise of due diligence, should have become aware of its claim against defendants not later than August 21, 1973, so that suit filed after expiration of applicable three-year statute or limitations was barred. C.R.S. '73, 11—51—123, 13—80—106, 13—80—108(1)(a, b), 13—80—109.

6. Securities Regulation 134

Element of fraudulent concealment did not apply to suit brought under federal securities laws, despite allegation that defendant destroyed his copy of certain agreement, where sales involving the agreement were not the only allegedly wrongful acts in which defendant and his law firm were asserted to have participated, where, even assuming that there was fraudulent concealment as to the sales involving the agreement, this would not have tolled statute of limitations as to all the other, nonconcealed acts allegedly committed which should have put plaintiff on notice that it had claim against defendant or his law firm, and where there was simply no fraudulent concealment as to plaintiff because defendant made no affirmative misrepresentations to plaintiff with respect to the agreement.

7. Federal Civil Procedure 2470.1

Summary judgment is a drastic action, available only in a case where there are no material issues of fact and a formal trial would be useless.

J. Vernon Patrick, Jr., Berkowitz, Lefkovits & Patrick, Birmingham, Ala., Harry J. Hobson, Miles M. Gersh, Luke J. Danielson, Holland & Hart, Denver, Colo., for plaintiff.

Donald M. Haskell, Mitchell A. Orpett, James J. Widland, Haskell, & Perrin, Chicago, Ill., Raymond J. Connell, Yegge. Hall & Evans, Denver, Colo., Donald J. McLachlan, Robert H. Wheeler, John W. Treece, Isham, Lincoln & Beale, Chicago, Ill., Jeffrey A. Hyman, Denver, Colo., for defendants

OPINION AND ORDER GRANTING SUMMARY JUDGMENT

SHERMAN G. FINESILVER, District Judge.

THIS MATTER, a securities case, is before the court on defendants' Motions to Dismiss, motions which we treat as Motions for Summary Judgment.[1] Defendants contend that the instant suit is untimely filed and hence barred by the applicable statute of limitations. Plaintiff, invoking the equitable tolling doctrine, asserts that its suit remains viable.

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[1] The motions are supported by affidavits and other matters outside the pleadings. Accordingly, pursuant to Fed.R.Civ.P. 12(b) and the mandate of *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 585 F.2d 454 (10th Cir. 1978), this

For reasons which follow, we grant defendants' motions and enter judgment for defendants.

I

Plaintiff is the state of Ohio. Through its Treasurer, plaintiff purchased a $3,000,000 promissory note on April 17, 1970 and a $5,000,000 promissory note on or about May 1, 1970. Both notes were issued by the King Resources Company ("KRC" hereinafter). Plaintiff alleges that there were securities violations in connection with the sale and purchase of those notes in 1970.

The defendants are a Chicago law firm, its successor in interest, and individual partners of the firm. The defendants were outside counsel for King Resources Company during the time in question. Plaintiff alleges that the statements, legal opinions, and representations of the defendant lawyers assisted King Resources Company and its accountants in materially overstating KRC's financial condition for the years ending December 31, 1968 and December 31, 1969. Plaintiff alleges that these defendants thereby violated provisions of federal and state law.[2]

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court has notified the litigants of the changed status of the motions and has provided them an opportunity to present all material made pertinent thereto. Order of December 6, 1978.

Upon plaintiff's request, we have allowed discovery to go forward on all issues relevant to the application of the statute of limitations. Order of February 8, 1979. Likewise, upon plaintiff's request, we have successively enlarged the time for filing affidavits so as to allow plaintiff the benefit of its discovery. Order of February 8, 1979; Order of April 4, 1979.

[2] Plaintiff alleges violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976); § 10(b) of the Securities Exchange Act of 1934, 15

The state of Ohio filed suit on April 17, 1972 against the King Resources Company, its accounting firm (Arthur Andersen & Company), a credit reporting firm (Dun & Bradstreet, Inc.), and several other named defendants, all with respect to the same transactions which underlie the instant lawsuit. *See, e.g., Ohio v. Crofters, Inc.*, 75 F.R.D. 12, 14—15 (D.Colo.1977); *see also*, Defendants' Exh. A(XII).

The state of Ohio did not file the instant suit, naming the law firms and the individual lawyers as defendants, until October 7, 1976. Plaintiff alleges in its complaint that it did not become aware of the violative conduct of the defendant lawyers until 1976. Complaint, ¶ 34 (October 7, 1976); Amended Complaint, ¶ 34 (dated January 22, 1979 and accepted by this court's Order of February 8, 1979). In its amended complaint, the state of Ohio claims that the defendant lawyers fraudulently concealed their activities so that plaintiff, despite the exercise of due diligence, remained unaware of its claim against them until 1976, "the year next preceding the filing of this complaint."

On December 29, 1978, the defendants renewed their Motions to Dismiss, based upon the statute of limitations. The matter is now properly at issue (see note 1, *supra*), it has been fully briefed, and, on June 15, 1979, the matter was argued in open court. We are now prepared to issue our order granting defendants' motions.

II

There are three related issues of law which are relevant to the application of the statute of limitations in the instant case.

U.S.C. § 78j(b) (1976); § 20 of the Securities Exchange Act of 1934, 15 U.S.C. § 78t (1976); and Rule 10b—5 of the Securities and Exchange Commission, 17 C.F.R. § 240- 10b—5 (1978). (Though the operative events occurred in 1969 and 1970, we cite to the most current codifications as there have been no material changes in the interim).

Invoking principles of pendent jurisdiction, plaintiff also alleges common law fraud and negligent misrepresentation.

These issues involve: (a) the determination of the governing statute of limitations, (b) the working of the equitable tolling doctrine, and (c) the effect of fraudulent concealment on the running of the statute. We discuss each of the three issues, in turn.

A

[1] The governing statute of limitations is three years for each of the claims advanced by plaintiff.

The claims arise under § 17 of the 1933 Act, §§ 10(b) and 20 of the 1934 Act, and under the common law of the state of Colorado (see, note 2, *supra*).[3]

With respect to the federal claims alleged here under the 1933 and 1934 Acts, the Congress has provided no statute of limitations.[4] Neither is there any federal statute of limitations for civil actions, generally. In this situation, the limitations period of the state in which the action is brought will be applied. We, thus, look to Colorado law.

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[3] Based generally upon *Trussell v. United Underwriters, Ltd.*, 228 F.Supp. 757 (D.Colo.1964), this court and other courts within this district have uniformly held that § 17 of the 1933 Act creates no private cause of action. *See, e.g., Nat'l Farmers Union Property and Casualty Co. v. Sterns Bros. & Co.*, 78—F—32 (D.Colo.Jan. 3, 1979) (unpublished) and cases collected, *id.*, slip op. at p. 1.

Moreover, this court has consistently declined to exercise pendent jurisdiction over related state claims in cases arising under the federal securities laws. *See, e.g., Kerby v. Commodity Resources, Inc.*, 395 F.Supp. 786 (D.Colo.1975).

In the current posture of the instant case, however, we will not, sua sponte, strike any of plaintiff's claimed theories of recovery. For purposes of the instant motions only, we will consider each of plaintiff's alleged theories of recovery to be properly before the court.

[4] In a civil action alleging fraudulent sale of securities in violation of § 17(a) of the 1933 Act, the period of limitations is *not* supplied by § 13 of the Act (15 U.S.C. § 77m). The provisions of § 13 apply only to actions based upon §§ 11 and 12 of the Act (15 U.S.C. §§ 77k and 77l). *Newman v. Prior*, 518 F.2d 97, 99 (4th Cir. 1975); *see, Nortek Inc. v. Alexander Grant & Co.*, 532 F.2d 1013 (5th Cir. 1976), *cert. denied*, 429 U.S. 1042, 97 S.Ct. 742, 50 L.Ed.2d 754 (1977); *Geo. H. McFadden & Bro., Inc. v. Home-Stake Production Co.*, 295 F.Supp. 587 (D.Okl.1968).

Our starting point is Colo. Rev. Stat. § 13—80—106 (1973). That statute provides that "[a]11 actions upon a liability created by a federal statute...for which actions no period of limitations is provided in such statute, shall be commenced within two years *or the period specified for comparable actions arising under Colorado law, whichever is longer*, after the cause of action accrues." (emphasis added). We therefore begin with a presumptive two year limitations period and next inquire whether there is any other period specified for comparable actions arising under state law which may be longer than two years.

It would appear that there is, indeed, a comparable action arising under state law. Such an action is provided for in the Colorado Securities Act, Colo.Rev.Stat. §§ 11—51—101 through —129 (1973) and, specifically, in § 11—51—123. Section 11—51—123 is an enactment in Colorado of § 101 of the Uniform Securities Act. *See, People v. Terranova*, 563 P.2d 363, 365 (Colo.App.1976). This provision of the Uniform Act, and the Colorado enactment thereof, is substantially identical to the Securities and Exchange Commission's Rule 10b—5 and to § 17 of the Securities Act of 1933. *See*, 7A Uniform Laws Annotated (1978), p. 568 (Commissioners' Note).[5]

Since Rule 10b—5 and § 17 of the 1933 Act are at the heart of plaintiff's federal action, it is inescapable that Colo.Rev. Stat. § 11—51—123 is the corresponding and comparable action at state law. Section 11—51—123 is, in essence, identical to the federal provisions upon which plaintiff relies.

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[5] Any possible doubt on that score is dispelled by the recent case, *Terranova, supra*, 563 P.2d at 367 (simple negligence cannot be the basis of liability under the Colorado Securities Act, scienter must be shown).

There is no specific limitations period attached to Colo.Rev.Stat. § 11—51—123.[6] We are, thus, compelled to look elsewhere in state law to find the applicable period. There are three other provisions of Colorado law which are of relevance. These relate to actions based upon fraud (Colo.Rev.Stat. § 13—80—109), upon implied or constructive fraud (Colo.Rev.Stat. § 13—80—108(1)(a), and upon all other actions of any kind for which no other period of limitation is provided (Colo.Rev.Stat. § 13—80—108(1)(b)). All three of these provisions set an identical three year limitations period. Without the necessity of further elaboration, it is thus apparent that, under one or another of these three statutes, a three year statute of limitations is provided by Colorado law for civil actions arising out of § 11—51—123 (the substantive state law provision which is most nearly comparable to the federal action brought by plaintiff herein).

It follows that, under the working of Colo.Rev.Stat. § 13—80—106 (the provision applicable to federal actions for which the Congress has set no statute of limitations), we apply, not the presumptive two year limitations period,[7] but rather the

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6. A separate section of the Colorado Securities Act, § 11—51—125%5), establishes a two year statute of limitations for civil actions arising *under that section*.

The substantive provisions of § 11—51—125 were adopted intact from the text of the Uniform Act, § 410, and are almost identical to § 12(2) of the Securities Act of 1933 (15 U.S.C. § 771(2)). *Lowery v. Ford Hill Investment Co.*, 556 P.2d 1201, 1208—09 (Colo. 1976); *see*, 7A Uniform Laws Annotated (1978), pp. 670—72 and Commissioners' Note, *id.* at 672.

As previously noted, § 11—51—123 is analogous to federal claims under Rule 10b—5 and under § 17 of the 1933 Act. As those provisions of federal law (and not § 12(2) of the 1933 Act) are the gravamen of plaintiff's federal claim, we look to 11—51—123 (and not 11—51—125) as being the more comparable provision of state law.

7. Since we have no occasion to apply the presumptive two year limitation period of the statute, we need not reach the question whether the two year limit is constitutional. *Compare, Trussell, supra*, 228 F.Supp. at 775—76 (unconstitutional) with, *McKinney v. Armco Recreational Products, Inc.*, 419 F.Supp. 464, 467 (D.Colo.1976) (not unconstitutional).

longer, three year period specified for the comparable Colorado Securities Act civil action.[8]

It follows that, under the working of Colo.Rev.Stat. § 13—80—106 (the provision applicable to federal actions for which the Congress has set no statute of limitations), we apply, not the presumptive two year limitations period,[7] but rather the longer, three year period specified for the comparable Colorado Securities Act civil action.[8]

In summary, we conclude that the governing statute of limitations is three years for each of the claims advanced by plaintiff.

B

[2] Though the limitations period is supplied by the law of Colorado, the circumstances which will toll the running of the statute are matters of federal law. *de Haas v. Empire Petroleum Co.*, 435 F.2d 1223, 1225 (10th Cir. 1970); *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir. 1967).

[3] The federal rule is that the statute of limitations does not begin to run until the plaintiff knew or, in the exercise of due diligence, should have known of the alleged fraud. *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir. 1974). The focus of the inquiry under the equitable tolling doctrine is the plaintiff and the question is whether plaintiff exercised due diligence in becoming aware of the wrong.

C

A final issue of law relevant to the instant case is the effect of fraudulent concealment on the running of the statute of limitations.

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[8] We accordingly reach the same result, albeit by somewhat different reasoning, as that reached by the court in *Trussell, supra*, 228 F.Supp. at 776. *Accord, deHass v. Empire Petroleum Co.*, 435 F.2d 1223, 1225 (10th Cir. 1970).

At the outset, we note that the cases have recognized at least two types of fraudulent behavior which may toll the statutory period. *See, Goldstandt v. Bear, Stearns & Co.*, 522 F.2d 1265, 1268 (7th Cir. 1975); *Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975).

The first, and most common type, occurs where a fraud goes undetected even though the defendant has done nothing, after the commission of the wrong, to conceal it. Here, plaintiff's due diligence (or lack thereof) in becoming aware of the wrong is the essential issue. This court does not consider a situation such as this to constitute a fraudulent concealment. Indeed, this is nothing more than a variant of the equitable tolling doctrine since the focus of inquiry remains on the plaintiff. We consider this situation to be subsumed under the equitable tolling doctrine and do not consider it to call for separate attention or analysis.

[4]The second, and more important type, occurs where the fraud goes undiscovered because the defendant has taken positive steps, after the commission of the wrong, to keep it concealed. Here the focus of inquiry shifts. Defendant's conduct will toll the limitations period (without any special concern as to plaintiff's due diligence) until such time as plaintiff actually discovers the underlying wrong. This is what we mean when we speak of fraudulent concealment.

So understood, the concept of fraudulent concealment adds something significant beyond the ambit of the equitable tolling doctrine. Fraudulent concealment, that is, defendant's affirmative action in concealing a prior wrong which results in the wrong's going undiscovered, will toll the statute of limitations without regard to plaintiff's due diligence.

III

The matter is now before the court on defendants' motions for summary judgment, based on the statute of limitations.

Each litigant has filed affidavits and exhibits in support of its position.

Based upon our review of the complaint and those uncontradicted affidavits and exhibits of record, we conclude that there are no genuine issues of material fact in dispute and that defendants are entitled to judgment as a matter of law.

At the outset, we summarize several of the more important background facts which are uncontroverted. We will then proceed to analyze the contentions of the parties in terms of the three dispositive legal issues previously discussed.

[5] Ohio's cause of action accrued no later than May 1, 1970. Plaintiff alleges that it purchased two promissory notes from King Resources Company and that the last such purchase occurred on or about May 1, 1970. The asserted securities fraud is alleged to have been in connection with those two purchases. The defendant lawyers are alleged to have assisted KRC and its accountants in materially overstating KRC's financial condition and Ohio contends that it relied upon such false and misleading information when it bought the KRC notes in 1970. There can be no doubt that Ohio's cause of action against the lawyer defendants must have accrued no later than May 1, 1970. That is the date of the last alleged purchase or sale. There are no other allegations to suggest that any wrong actionable under the securities laws took place after that date.

Ohio knew that it had a cause of action against someone as early as 1972. On April 17, 1972, Ohio filed suit against KRC, its accountants (Arthur Andersen & Co.), a credit reporting firm (Dun & Bradstreet, Inc.), and others. *Ohio v. Crofters, Inc.*, 72—138 (S.D.Ohio Apr. 17, 1972). Defendants' Exh. A(XII). A review of the *Crofters* complaint clearly establishes that the underlying cause of action there asserted is the same as that which underlies the instant complaint.

Ohio knew that others, similarly situated, had filed complaints similar to the complaint it had filed in *Crofters* and that certain of these other plaintiffs had named as defendants the lawyer who had counseled KRC. At the very least, Ohio knew of those cases transferred to the United States District Court for the District of Colorado and consolidated for pretrial procedures pursuant to order of the Judicial Panel on Multidistrict Litigation, *In re King Resources Company Securities Litigation*, 342 F.Supp. 1179 (Jud.Pan.Mul.Lit.1972). The reason that Ohio must have known is that it, too, was a participant in those consolidated proceedings. *See, In re King Resources Company Securities Litigation*, 352 F.Supp. 975 (Jud.Pan.Mult.Lit.1972) (transferring *Ohio v. Crofters*, S.D.Ohio, No. 72—138, to the United States District Court for the District of Colorado for consolidated pretrial proceedings with the other cases). Among those other cases were four which named Mr. Timothy Lowry as defendant.[9] Mr. Lowry was counsel to KRC, and was a partner in the law firm which is a defendant in the instant action.

Ohio knew that there was a reorganization proceeding which involved KRC pending in the United States District Court for the District of Colorado. The reason that Ohio must have known is that it, too, was a participant in those proceedings. Ohio filed its statement of claim in the amount of $8,000,000 in those proceedings on March 2, 1972. Defendants' Exh. C(II).

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[9] *Gross v. Blyth & Co.*, No. 70—751 (D.Or. Nov. 9, 1970; *Dietrich Corp. v. King Resources Co.*, No. C—3424 (D.Colo. Sep. 28, 1971); *Morrell v. King*, No. C—71—805 (N.D.Ohio May 10, 1972); *Licker v. King Resources Co.*, No. C—71—882 (N.D.Cal. May 10, 1971).

See generally, In re King Resources, supra, 342 F.Supp. at 1184; Defendants' Exh. A(IV), A(VIII), A(XV).

The *Dietrich* complaint is particularly significant. In addition to naming Lowry, it alleges wrongdoing in connection with a certain sale of Canadian arctic properties. Complaint, ¶29, Defendants' Exh. A(VIII). This arctic sale is what plaintiff has characterized as "[p]erhaps the most significant single transaction" in its current suit Carroway Affidavit at p. 2.

Finally, we observe, Ohio filed the instant lawsuit on October 7, 1976.

A

As previously noted, the governing statute of limitations is three years for each of the claims now advanced by plaintiff against the defendant lawyers. Since the cause of action can have accrued no later than May 1, 1970, it follows that the statute of limitations expired no later than May 1, 1973. Because the instant suit was not filed until 1976, it follows tha the suit is time barred unless the statute is somehow tolled.

B

As previously noted, the statute of limitations does not begin to run until the plaintiff knew, or in the exercise of reasonable diligence, should have known of the alleged fraud.

Plaintiff alleges, and offers affidavits in support of the allegations, that it did not obtain actual knowledge of the defendant lawyers' involvement until sometime in 1976. The determinative issue thus is whether (and if so, when) plaintiff could have, in the exercise of due diligence, discovered the connection earlier than it did.

We find and conclude, on the undisputed facts before us, that plaintiff should, as a matter of law, have become aware of the defendant lawyers' involvement not later than August 21, 1973.

Prior to August 21, 1973, Ohio was aware that it had a cause of action arising out of its purchases of KRC notes. Prior to August 21, 1973, Ohio was aware that several other plaintiffs had named Mr. Timothy Lowry, counsel to KRC and partner in a Chicago law firm, as a defendant. Prior to August 21, 1973, Ohio was aware of the reorganization proceedings involving KRC.

On August 21, 1973, the trustee in the KRC reorganization filed an application with the court for permission to file suit, attaching a copy of the proposed complaint (which complaint, *Baer v. Franklin Supply Co.*, C—38733, was ultimately filed) naming as a defendant, not only Mr. Lowry, but also Mr. Lowry's law firm, Peterson, Lowry, Rall, Barber & Ross. Defendants' Exh. C(XII). The proposed complaint alleged that Lowry and his firm had defrauded KRC of some $1,100,000. As a creditor in the reorganization proceedings with a claim in the amount of $8,000,000, Ohio is charged with knowledge of what the trustee was doing and, specifically, with knowledge of the trustee's complaint.

At this point, in August of 1973, given all the other information which Ohio had, the conclusion is irresistable that, in the exercise of due diligence, Ohio should have realized that its cause of action embraced Mr. Lowry and his law firm. There are, at this point, simply too many palpable signs of the lawyers' involvement to excuse Ohio's continued ignorance. Ohio was then on inquiry and the statute began to run.

In assessing the meaning of due diligence, this court gives some weight to the amount in controversy and the legal sophistication of the party involved. In this case, the state of Ohio is much more than a casual dabbler in the securities market. The size of the claim alone implies that a degree of care and diligence should be employed in its pursuit. Nonetheless, even disregarding these factors, the court would still conclude that plaintiff did not remain in ignorance without any want of diligence or care.[10]

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[10] We note Ohio's argument that, just as courts have re-evaluated the due diligence standard as it relates to the merits of a securities claim, *see, e.g.*, *Holdsworth v. Strong*, 545 F.2d 687, 693—95 (10th Cir. 1976), so should the

The doctrine of equitable tolling, though perhaps applicable in this case up to a point, does not prevent the instant claim from being time barred. Whatever might have been the situation prior to August 21, 1973, Ohio should have (in the exercise of due diligence) become aware of its claim against the lawyers not later than that date. Applying the three year statute of limitations from that date, the instant suit is barred because it was not filed until October 7, 1976.

C

[6] Finally, we address the question of fraudulent concealment. Plaintiff alleges that defendant Lowry fraudulently concealed his wrongdoing by destroying his copy of a certain document.

The relevance of the destroyed document goes to what plaintiff describes as "[p]erhaps the most significant single transaction in the case," (Carroway Affidavit at p. 2). In brief summary, it appears that KRC held an interest in a large acreage of drilling permits in the Canadian arctic. Plaintiff alleges that KRC sold a small fraction of its interests, using the market prices of the sale to write up the book value of its remaining like assets in an amount of approximately $100,000,000. Ohio contends that the sales in question were

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courts re-evaluate the due diligence standard as it applies to tolling the statute of limitations.

One court which has, apparently, already taken that step with respect to the equitable tolling doctrine has noted that the proper inquiry should be whether a plaintiff intentionally refused to investigate in disregard of a known risk. *Osterneck v. E. T. Barwick Industries, Inc.*, 79 F.R.D. 47, 52 (N.D.Ga.1978).

We find and conclude that Ohio's argument is immaterial in the instant case. Upon the undisputed record, it is quite clear that Ohio's conduct exceeded simple negligence and amounted to intentional disregard of a known risk. Since Ohio cannot prevail, regardless of which standard is imposed, the instant case is not the appropriate one in which to address the current content of the due diligence standard.

not really arms length transactions at all, but that certain of the buyers were affiliated with KRC. Evidence of one such buyer's affiliation was, plaintiff asserts, contained in what it refers to as the Mecom side agreement.[11] Plaintiff alleges that defendant Lowry kept a copy of the Mecom side agreement in his office safe and then destroyed it.

Ohio first found out about the Mecom side agreement sometime in 1976, according to allegation and affidavit. It argues that defendant Lowry's destruction of his copy of the Mecom side agreement constitutes fraudulent concealment which tolls the statute until such time as plaintiff actually discovers the underlying wrong.

There are two fatal flaws to plaintiff's argument. In the first place, the Arctic sales are not the only allegedly wrongful acts in which Lowry and his law firm are asserted to have participated. Even assuming that there is fraudulent concealment as to the Arctic sales, this would not toll the statute as to all the other, non-concealed acts which should have put Ohio on notice that it had a claim against Lowry or his law firm. In the second place, there simply is no fraudulent concealment as to Ohio. Mr. Lowry made no affirmative misrepresentations to Ohio with respect to the side agreement. It has been noted that "[f]raud is always concealed. If it was not no fraud would ever succeed." *Tomera, supra,* 511 F.2d at 510, *quoting, Smith v. Blachley*, 198 Pa. 173, 47 A. 985, 987 (1901). To rise to fraudulent concealment, there must be something more, perhaps personal or face-to-face deception. That added element is clearly absent here.

We conclude that the element of fraudulent concealment is inapplicable in the instant case. The statute of limitations is not tolled.

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[11] Ohio alleges further that the so called side agreement is also evidence that the Mecom transaction was not even a sale at all but was, at the most, the grant of an option. Ohio thus challenges KRC's posting of an immediate profit of $4.2 million on its books as a result of such "sale."

IV

[7] Summary judgment is a drastic action, available only in a case where there are no material issues of fact and a formal trial would be useless. *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977). The motion should be granted only when the moving party has established the absence of any genuine issue as to a material fact. *Williams Petroleum Co. v. Midland Cooperatives, Inc.*, 539 F.2d 694, 697 (10th Cir. 1976). The court must examine the summary judgment papers in the light most favorable to the party opposing the motion. *Nat'l Aviation Underwriters v. Altus Flying Service, Inc.*, 555 F.2d 778, 784 (10th Cir. 1977). All the ambiguities and disagreements must be resolved in favor of the party against whom summary judgment is sought. *Webb v. Allstate Life Ins. Co.*, 536 F.2d 336, 339—40 (10th Cir. 1976).

Cases involving defenses hinging on applicable statutes of limitations on occasion lend themselves to summary judgment. *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir. 1974). On the other hand, the issue of due diligence is often a question of fact, inappropriate for summary disposition. *Dzenits, supra*, 494 F.2d at 172.

The court has examined the pleadings, exhibits, affidavits, and other material on file herein and concludes that no genuine issue as to any material fact exists in this case and that defendants are entitled to judgment as a matter of law. *See*, Fed.R.Civ.P. 56(c).

V

We note in passing that our opinion has focused, thus far, and for clarity's sake, on those selected court pleadings in particular related proceedings as to which plaintiff was most obviously aware because of its own participation. Most prominent of these previously noted suits are *Dietrich* (*see*, note 9, *supra*) and the trustee's suit (*see*, p. 408, *supra*). We emphasize that this is just the tip of the iceberg.

Other noteworthy related litigation includes *Bottger v. King Resources*, C—3878 (D.Colo. Mar. 23, 1972) (second amended complaint, naming both Lowry and his law firm as defendants); *S.E.C. v. King Resources*, C—2858 (D.Colo. Jan. 25, 1971) (complaint naming Lowry as defendant); and *American Employers Ins. Co. v. King Resources*, C—3908 (D.Colo. Apr. 6, 1972) (complaint naming Lowry, including specific allegations of Lowry's involvement at ¶ 1—68, 95—102). These were all major cases involving KRC. They each received a great measure of publicity. *See generally*, Defendants' Exh. A. The state of Ohio had actual knowledge of these cases no later than 1973, *see*, Defendants' Exhibit D(XXIV) (1973 notes of one of Ohio's attorneys, summarizing the related litigation), if not much earlier.

In emphasizing the related lawsuits, as we have done, we do not mean to be understood as denigrating the importance of other undisputed facts in the record. We might refer to Defendants' Exh. D(XVIII) (Apr. 11, 1973 memo prepared by one of Ohio's attorneys which states that "[o]ur negligence in this case has been stunning.") and to Defendants' Exh. D(XXV). This remarkable document is a memo to the file originated by Ohio's chief counsel. The memo, Exh. (XXV), reflects a June 20, 1973 *call from Mr. Lowry's attorney* whereby Lowry's attorney sought *to ascertain whether Ohio would be amenable to settlement.*

These documents speak for themselves. We have relied upon these documents, as well as upon the entire record, in reaching our decision herein.[12]

VI

In summary, we have found that the instant suit was filed in 1976, well after the applicable statute of limitations had run. We have further found that neither the doctrine of equitable tolling of the statute nor the element of fraudulent concealment can, as a matter of law, prevent the running of the statute in this case.

Speaking plainly, what we are holding is this: Plaintiff was on notice, not later than August 21, 1973. This does not mean that plaintiff could have (or should have) filed suit on August 22, 1973. What it does mean, though, is that plaintiff must have filed a lawsuit in the next succeeding three years, on or before August 22, 1976. This it did not do. Inexplicably, the state of Ohio sat on its rights, failed to exercise even the slightest care, and so lost its right of action against these defendants.

Plaintiff cannot, in these circumstances, be heard properly to seek equitable relief in this court from the statute of limitations. Common sense rebels at the notion that Ohio, a sophisticated investor with $8,000,000 at stake, could have remained in ignorance as long as it did. Common sense likewise rebels at the notion (so strenuously argued by Ohio) that a general fraudulent scheme of such large proportions as this could be rendered undiscoverable by any alleged concealment of a single part.

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[12] We note, for the record, that Ohio's current counsel were retained well after 1973 and that none of the acts or omissions referred to herein may be attributed to current counsel.

This is a case in which plaintiff waited six years from the time its cause of action accrued before bringing suit. We are satisfied that the instant case is more than appropriate for summary disposition.

ORDER

Accordingly, and for all the reasons stated above, it is hereby ORDERED that defendants' Motions for Summary Judgment are GRANTED.

Judgment shall enter for defendants and against the plaintiff. Plaintiff's complaint and cause of action are hereby dismissed. Defendants to recover their costs.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

STATE OF OHIO
Plaintiff-Appellant,

v.

PETERSON, LOWRY, RALL, BARBER & ROSS, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. Civil Case No. 76-F-992)

J. Vernon Patrick, Jr., (Thomas J. Gallo and William R. Sylvester, with him on the brief) of Berkowitz, Lefkovits & Patrick, Birmingham, Alabama; (and Harry L. Hobson and William J. Baum, Jr. of Holland & Hart, Denver, Colorado, with him on the brief), for Plaintiff-Appellant.

Robert H. Wheeler (Donald J. McLachlan and John W. Treece, with him on the brief) of Isham, Lincoln & Beale, Chicago, Illinois; (and Jeffrey A. Hyman, Denver, Colorado, with him on the brief), for Defendants-Appellees Peterson, Ross, Rall, Barber & Seidel and individually-named defendants-appellees except Timothy G. Lowry.

Mitchell A. Orpett (Donald M. Haskell and James J. Widland, with him on the brief) of Haskell & Perrin, Chicago, Illinois; (and Raymond J. Connell of Yegge, Hall & Evans, Denver, Colorado, with him on the brief), for Defendant-Appellee Timothy G. Lowry.

Before SETH, Chief Judge, McKAY, Circuit Judge, and PALMIERI, District Judge*.

PALMIERI, District Judge.

The State of Ohio appeals from a summary judgment dismissing its action in securities fraud as barred by the statute of limitations. Ohio brought this action under § 20 and § 10(b) of the Securities Exchange Act of 1934[1] against Peterson, Lowry, Rall, Barber & Ross, a Chicago law firm, and Timothy G. Lowry, a former member of that firm, on October 7, 1976 in the District of Colorado. The district court found, in a thorough opinion, after permitting Ohio to amend its complaint and after a full opportunity for discovery had been afforded the parties,[2] that the applicable three-year statute of limitations had run. This decision followed an earlier appellate disposition in the case by this court which resolved certain procedural problems but left the limitations question open for decision on a fresh record. *Ohio v. Peterson, Lowry, Rall, Barber & Ross,* 585 F.2d 454 (10th Cir. 1978).

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*The Honorable Edmund L. Palmieri, Senior Judge of the United States District Court for the Southern-District of New York, sitting by designation.

[1] Appellant also claimed under § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q. Since it is now settled that there is no private right of action for damages under § 17(1), *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), we consider only the claims under the 1934 Act.

[2] Although Ohio complains that its right of discovery had been severely restricted in this case, it nevertheless reviewed over 6,000 documents from appellees' files and obtained copies of some 1,500 pages, in addition to taking depositions of Lowry and Herbert C. Loth, Jr., a member of the Peterson firm.

The Factual Background

On April 17 and May 1, 1970, Ohio bought two promissory notes of King Resources Company (KRC) for a total of $8 million as part of its investments in commercial paper. Each had a two-year maturity. KRC was involved in oil, gas, and other natural resource ventures. Its bankruptcy in 1971 entailed creditor and investor losses of many millions of dollars. On November 16, 1970, the Securities and Exchange Commission filed a complaint in the Southern District of Ohio against the broker who handled the sale of the notes to Ohio and also against KRC, John M. King (KRC's founder, former chairman and major stockholder), and numerous others, alleging fraud in the sale of KRC securities. *SEC v. Crofters,* 351 F.Supp. 236 (S.D. Ohio 1972). On the basis of the S.E.C.'s complaint, later in 1972 Ohio brought an action in securities fraud against fifteen defendants, including KRC, John M. King, and KRC's accounting firm. *See Ohio v. Crofters,* 75 F.R.D. 12 (D.Colo. 1977). Both *SEC v. Crofters* and *Ohio v. Crofters* dealt with the same transactions which form the basis of the case at bar.

At the time of the fraud alleged in *Ohio v. Crofters,* the appellee law firm represented KRC, and appellee Lowry was KRC's general counsel and a member of its board of directors.[3] Although Ohio failed to join appellees as defendants, their possible role in the alleged fraud did not escape other plaintiffs. Lowry and the firm were named as defendants in at least eleven other suits concerning KRC. Many of these suits were consolidated with *Ohio v. Crofters* after it was transferred by the Judicial Panel on Multi-district Litigation to the District of Colorado on November 17, 1972. *See In re KRC Securities Litigation*, 352 F. Supp. 975 (J.P.M.L. 1972).

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[3] Ohio's claim against the firm is based primarily if not entirely upon vicarious liability for Lowry's acts. Though other firm members were named as individual defendants, we find no issue on this appeal which depends upon independent liability of the firm or any of its members. In our discussion below, any references to the acts of Lowry must be understood to apply equally to the firm.

Exhibits in the record indicate that the KRC lawsuits received extensive publicity almost from the time of the initial collapse of KRC. Lowry was prominently mentioned in a number of such articles. The publications included the nationally circulated *Wall Street Journal* and local newspapers in Ohio, Texas and Colorado.

Internal memoranda from the Ohio Attorney General's office produced on discovery reveal that Lowry's possible involvement had come to the attention of Ohio's lawyers in 1972 or early in 1973. A note from the Ohio files made by Richard N. Patterson, then an Assistant Attorney General, refers to Lowry as "active in the inflation"—presumably a reference to the fraudulent inflation of KRC's stated assets. A June 1973 memorandum reflects a call received by the Attorney General's office about Ohio's willingness to settle a claim against Lowry's director's liability policy.[4]

An involuntary petition in bankruptcy had been filed against KRC on August 18, 1971, in the Northern District of Texas. After venue was changed to the District of Colorado, the trustee in bankruptcy, acting on behalf of KRC's creditors, applied for permission to sue Lowry and the Peterson firm. Ohio was a major creditor and active participant in the bankruptcy proceeding. The trustee's proposed complaint, filed in the bankruptcy proceeding on August 21, 1973,[5] alleged that Lowry and the firm had conspired to defraud KRC of $1.1 million from December of 1968 through October of 1970—the period during which Ohio had purchased its KRC notes.

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[4] Ohio's present claim under § 20, 15 U.S.C. § 78t, relates to Lowry's statutory liability as a director of KRC.

[5] The court below chose this date as the point at which, "given all the other information which Ohio had, the conclusion is irresistible that, in the

Ohio argues that the statute of limitations in its fraud action against appellees should be tolled until January 5, 1976, the date when Ohio claims it first discovered the fraud by Lowry and the firm. On that date, Lowry revealed in a deposition that a sale which he had certified in 1970 as genuine was in fact subject to a secret buy-back agreement, a copy of which Lowry had hidden in his firm's safe in Chicago and later destroyed. Ohio, noting that it could not have deposed Lowry earlier because of a court-imposed stay of discovery, claims that despite its diligence it could not have known of Lowry's involvement[6] until Lowry's deposition. Appellees offer a different explanation for Ohio's delay. They note that Patterson, referring to the KRC bankruptcy proceeding in an internal memorandum of the Attorney General's office dated April 11, 1973, said that "our negligence in this case is stunning," and added: "I cannot emphasize more strongly . . . the fiasco further apathy might engender."

I.

Since there is no federal statute of limitations applicable to private actions under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and S.E.C. Rule 10b-5 promulgated thereunder, the limitations period is supplied by the law of the forum state. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 210 n.29 (1976). The district court held that the applicable state statute

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exercise of due diligence, Ohio should have realized that its cause of action embraced Mr. Lowry and his law firm. On this basis, Ohio's action would be barred after August 21, 1976, a month and a half before Ohio filed the present action.

[6] Ohio claims late discovery only of Lowry's personal role in the bogus sale. Ohio knew of the fraudulent nature of the sale itself no later than 1972.

was Colo. Rev. Stat. § 13-80-109 (1973), and that ruling has not been appealed. Section 13-80-109 provides: "Bills of relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud, and not afterwards."

The rule in this circuit has been that in fraud cases only the limitations *period* is borrowed from state law, whereas the tolling rule is supplied by federal jurisprudence. *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). As we noted not long ago, *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 (10th Cir. 1980), the *Esplin* rule appears to conflict with certain language in *Board of Regents v. Tomanio*, —U.S.—, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). There, the Supreme Court held that under the borrowing statute for federal civil rights cases, 42 U.S.C. § 1988, a federal judge was barred from exercising equitable power to toll the limitations period where the borrowed state statute contained no provision for tolling under the circumstances presented and further provided: "No court shall extend the time limited by law for the commencement of an action." *Id.*, 100 S.Ct. at 1796, 64 L.Ed.2d at 449. Section 1988 applies only to the civil rights provisions of Title 18 and Title 42, United States Code. There is no analogous borrowing statute applicable to implied private actions under the Securities Exchange Act of 1934. To apply the *Tomanio* rule by analogy to cases where federal courts borrow a state limitations period as a matter of judicial convenience would in effect overrule[7] *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), a decision whose continuing vitality is attested by the many cases relying upon it in § 10(b) private actions.[8] We do not believe the Supreme Court intended that such a significant consequence should be attached *sub silentio* to its decision, especially since the precedents cited by the Court in *Tomanio* all deal with civil rights cases under § 1988. *Board of Regents v. Tomanio, supra,* 100 S.Ct. at 1794, 64 L.Ed.2d at 447.

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[7] We note that the state statute before the Court in *Holmberg*, a predecessor of the New York statute involved in *Tomanio*, provided: "A court or judge is not authorized to extend the time fixed by law within which to commence an action . . ." § 99(1), N.Y. Civil Practice Act of 1920, as amended by 1938 N.Y. Laws c.112.

Another reason for standing by our decision in *Esplin v. Hirschi* is the question (left unanswered by *Tomanio*) of how deeply into state case law a federal court deciding a federal cause of action must go in order to borrow a state limitations period. *Tomanio* stays within the four corners of the state statute. Here, however, Colo.Rev.Stat. § 13-80-109 computes the limitations period from plaintiff's discovery of the fraud without any requirement that plaintiff exercise reasonable diligence. For the diligence requirement, one must look to Colorado decisions. *Greco v. Pullara*, 166 Colo. 465, 444 P.2d at 383 (1968). Similarly, one question we must resolve in this case concerns the respective roles of judge and jury on the issue of diligence. Colorado law would apparently leave it to a jury. *Owens v. Brochner*, 172 Colo. 525, 474 P.2d 603 (1970); *Norton v. Leadville Corp.*, —Colo.App.—, 610 P.2d 1348 (1980). We think, however, that the law of plaintiff's diligence in private actions under § 10(b) can better develop by reference to other federal securities cases rather than by analogy to Colorado decisions on the diligence of plaintiff in discovering grounds for an action in medical malpractice. *See Owens v. Brochner, supra*, (brain tumor); *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944) (sponge sewn into plaintiff's abdomen).

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[8] *See e.g., Gaudin v. KDI Corporation,* 576 F.2d 708 (6th Cir. 1978); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978); *United California Bank v. Salik*, 481 F.2d 1012 (9th Cir. 1973), *cert. denied,* 414 U.S. 1004 (1973); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972); *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970); *Hooper v. Mountain States Securities Corporation,* 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1963).

The tolling of the three-year statute of limitations applicable to this case, therefore, is to be determined under the principles announced by the Supreme Court in *Holmberg v. Armbrecht, supra.*

II.

Federal equitable tolling provides that when a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered . . ." *Bailey v. Glover*, 21 Wall. (88 U.S.) 342 (1875). In *Holmberg*, the Court made clear that the *Bailey* rule applies not only to federal statutes but also to statutes borrowed from the states in federal question cases. The borrowed limitations period does not begin to run "until after [plaintiff] had discovered, or had failed in reasonable diligence to discover, the alleged deception . . ." *Holmberg v. Armbrecht, supra,* 327 U.S. at 397.

Appellant argues that diligence and the time of discovery are necessarily questions for the jury and cannot be decided by the court on a motion for summary judgment. "The question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law." *Aldrich v. McCulloch Properties, Inc., supra,* 627 F.2d at 1042, citing *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 494 F.2d 168 (10th Cir. 1974), where we held that "in a case such as this" (broker's churning of plaintiff's account) it would be "seldom, if ever, possible for a judge to determine summarily when the injured person . . . became fully aware that he or she had been victimized." *Id.*, at 172. *See also Robertson v. Seidman & Seidman,* 609 F.2d 583, 591 (2d Cir. 1979); *Azalea Meats, Inc. v. Muscat,* 386 F.2d 5, 8 (5th Cir. 1967).

Another line of cases, however, supports summary disposition. In at least one § 10(b) case since *Dzenits* we have affirmed a summary judgment for defendant on the issue of discovery.

Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979). Many cases from other circuits have affirmed summary judgment for defendant on discovery or diligence, using a variety of legal theories.[9]

In view of these conflicting precedents, we have found it helpful to consider the origins of equitable tolling. Early English statutes of limitation provided that "no person shall sue, have or maintain any writ" after a specified time. 32 Hen.VIII c.2 (1540). Since the statute did not apply to chancery, however, a party with no remedy at law because of the statutory bar could sue out a bill in equity. But to win the chancellor's favor, the suitor would have to show by clear and convincing proof that he had been diligent and faultless in pursuit of his rights.[10] Thus the U.S. Supreme Court, in announcing that the limitation provision of the federal bankruptcy statute could be tolled by a federal judge on equitable grounds, made clear that tolling could occur only where plaintiff's delay was without "fault," "want of diligence or care," "negligence" or "laches." *Bailey v. Glover, supra,* at 349-50. In equity the issue of diligence was decided by the chancellor often on written petitions as opposed to live testimony—a procedure much like our summary judgment under Fed.R.Civ.P. Rule 56.

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[9] *See, e.g., Gaudin v. KDI Corp.*, 576 F.2d 708, 712 (6th Cir. 1978) (as a matter of law, plaintiff should have inferred fraud from precipitous decline of stock, other lawsuits, etc.); *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977) (plaintiff could have discovered fraud from defendant's admissions in S.E.C. release and the listing of defendant as 'in peril' by stock exchange); *Goldstandt v. Baer, Stearns & Co.*, 522 F.2d 1265 (7th Cir. 1975) (plaintiff should have sought independent legal advice); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975) (plaintiff should have discovered raud in light of stock's precipitous decline and other lawsuits); *Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974) (plaintiff's affidavits failed to show actual diligence); *Klein v. Shields & Co.*, 470 F.2d 1344, 1346-7 (2d Cir. 1972) (at least the possibility of fraud should have been apparent from earlier lawsuit).

[10] Equity's requirement that plaintiff prove *actual* diligence has survived in a few modern federal cases. *See, e.g., Arneil v. Ramsey, supra*, at 781; *Hupp v. Gray, supra; Morgan v. Koch*, 419 F.2d 993, 996 (7th Cir. 1969). *But see Goldstandt v. Baer, Stearns & Co., supra*, at 1268.

In 1833, Parliament enacted a statute providing that actions in fraud shall be "deemed to have accrued at, and not before, the time at which such fraud shall or with reasonable diligence might have been discovered . . ."[11] 3&4 Wm.IV c.27 § 26. Many legislatures in the United States followed the English example during the 19th century, apparently intending to do no more than codify the equitable doctrine and make it applicable to the law courts. But a consequence of codification was that accrual became an element of a statutory defense and thus had to be proved in a jury trial. Meanwhile, the equitable rule subsisted side by side with the new statutes, and even extended in some cases to actions at law, at least in federal cases where a statutory tolling provision was lacking. "We see no reason why the principle [of equitable tolling] should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side." *Bailey v. Glover, supra,* at 349.

Despite the union of law and equity, the distinction has continuing significance in federal civil actions on the question of trial by jury, since the Seventh Amendment does not apply to claims within equity jurisdiction. *Parsons v. Bedford,* 3 Pet. (28 U.S.) 433, 447 (1830). *See also Pernell v. Southall Realty,* 416 U.S. 363, 374-6 (1974); *Curtis v. Loether*, 415 U.S. 189, 192-4 (1974); *Ross v. Bernhard*, 396 U.S. 531 (1970). When federal courts imply a private right of action under a federal statute, they must frequently decide whether the remedy sought is of legal or equitable nature.[12]

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[11] The Statute of William is perhaps the source of the modern test based upon hypothetical as opposed to actual diligence.

[12] Cf. *In re Gartenberg*, 2d Cir. slip opin. at 49 (Oct. 9, 1980) which held that an action under § 36(b) of the Investment Company Act of 1940, as amended, 15 U.S.C. § 80a-35(b), is equitable in nature and should be tried to the court.

In view of the equitable origin of the tolling doctrine, we think there remains some room for discretion by the court on the issue of plaintiff's discovery and diligence in cases under § 10(b) when the pleadings show that the action would be time-barred but for the equitable doctrine. In the cases where other circuits have affirmed summary judgment on diligence, the district judges have essentially decided the tolling issue in the manner of chancery.[13] We think that such discretion was proper in the case at bar.

III.

Limitations rules have traditionally been cast in terms of a prohibition on the commencement of an action.[14] In addition to the general policy favoring repose and the quieting of titles, the statute seeks to relieve defendants of the cost and vexation of protracted litigation and the uncertainty of contingent liabilities. Not only defendants but also the courts have an interest in the timely commencement of actions. The adjudication process is hampered by stale evidence and absent witnesses; the burden on court calendars would instantly increase if actions now time-barred were revived by a new statute or tolling rule.

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[13] As many authorities have said, the question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law. *Aldrich v. McCulloch Properties, Inc., supra*, 627 F.2d at 1042; 6 L. Loss, *Securities Regulation*, 3905 (2d ed. Supp. 1969). Nevertheless, trial judges frequently conclude that dismissal *in limine* is the proper disposition of cases such as this, and such dismissal has often been upheld on appeal. Cases like those cited in footnote 9 *supra* cannot be adequately explained as individual determinations of law, each on a question of first impression unique to the particular facts of the case. We think that equitable discretion by the trial court is a better explanation.

[14] *Compare* 32 Hen. VIII c.2 ("No person shall sue, have or maintain any writ . . .") with Colo.Rev.Stat. § 13-80-109 ("Bills of relief on the ground of fraud shall be filed within three years . . . and not afterward").

Any rule which makes the statute of limitations necessarily a jury question defeats the statute's purpose of preventing trials of stale claims. The need to avoid vexatious litigation is especially acute in cases under § 10(b) involving public misrepresentations in the sale of publicly traded securities, an area of the law which readily engenders multiple lawsuits arising out of the same underlying transactions. Contingent liabilities due to unfiled claims create special problems when they involve corporations with publicly traded securities. These problems are compounded by a tolling rule which effectively neutralizes the statute of limitations.

Where, as here, a § 10(b) action alleges substantially the same facts as in prior litigation, summary disposition is appropriate if the documents before the court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such a time as to bar the action. If the documents before the court are not sufficiently persuasive to meet this stringent test, a jury ultimately deciding the facts will determine by a preponderance of the evidence whether the action accrued too remotely. We uphold the trial court's order in this case because we find that it was well supported by the record and was not an abuse of discretion.[15]

IV.

The court below applied the diligence rule as we have stated it here. Appellant, however, claims that a different rule obtains in this case because of the secret buy-back agreement, which Lowry concealed and then destroyed nearly two years after the initial fraud. The *Holmberg* rule, says appellant, applies only to simple fraud; where defendant has taken steps after the initial fraud to prevent its discovery, the statute of limitations is tolled until actual discovery regardless of diligence. Although we find some support for this view, *Robertson v. Seidman & Seidman, supra,* 609 F.2d at 593; *Sperry v. Barggren,* 523 F.2d 708, 711 (7th Cir. 1975); *Tomera v. Galt,* 511 F.2d 504, 510 (7th Cir. 1975), we see no reason why an act of concealment by defendant should excuse plaintiff from his obligation of diligence, which he owes the court as well as his adversaries. Of course, if defendant *successfully* conceals the fraud, the concealment would fool the hypothetical diligent plaintiff and toll the statute. But where, as here, the concealment is insufficient to fool a reasonably diligent plaintiff but nevertheless allegedly prevented discovery by Ohio, the second doctrine of fraudulent concealment urged by appellant would simply give it a second arrow to its bow. We hold, therefore, that there is but one federal doctrine of equitable tolling, as set forth in *Holmberg v. Armbrecht, supra.*[16]

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[15] We feel constrained to stress that our concern today is with frauds based on material misstatements regarding publicly traded securities. It may well be that the trial court's discretion to rule summarily on discovery or diligence should be exercised more sparingly in face-to-face, "private" frauds under § 10(b). *See Aldrich v. McCulloch Properties, Inc., supra; Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra.*

V.

Shortly after appellant filed *Ohio v. Crofters,* that case was consolidated with many other suits involving the same or related facts. The court below had no need to enquire as to whether appellant actually obtained the pleadings and other papers from the actions consolidated with Ohio's, since a diligent plaintiff would obtain such documents and scrutinize them. Similarly, appellant as an active and major participant in the KRC bankruptcy proceeding had constructive if not actual knowledge of all papers filed by the trustee in bankruptcy and responses thereto.

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[16] The view that there are two distinct doctrines of tolling perhaps derives from a confusion with earlier versions of the equitable rule requiring plaintiff to prove actual diligence. Such proof was excused if defendant had concealed all cause of reasonable suspicion. The exception is redundant under our test based on hypothetical diligence.

Even if we were to adopt appellant's view of the law, we note that the record would also support a finding of actual discovery by Ohio of Lowry's involvement in the fraud. We do not reach this point because the court below based its decision on diligence, see footnote 5, *supra*, and we affirm on that basis.

Appellant argues that the complaints filed by other plaintiffs contained mere allegations of fraud by Lowry, and that Ohio cannot be charged with discovery of the fraud until such allegations and suspicions are supported by hard evidence. We disagree. Discovery under the equitable tolling doctrine merely starts the limitations period running. From that point on, appellant had three years[17] to find the minimum support necessary for filing a complaint. After filing it, Ohio would have had more time to develop the evidence and to refine the issues through pre-trial discovery.

Ohio knew no later than 1972 that the "sale" by KRC of certain Arctic land permits was fraudulent. Ohio also apparently knew that KRC's accountants, before writing up KRC's assets on the basis of this sale, had obtained a letter certifying that the sale was genuine. The letter was signed by King and Lowry. We do not accept Ohio's claim that it did not discover Lowry's fraud until 1976, because it did not know until then of Lowry's personal role in the secret buy-back agreement. Ohio's discovery that the representation letter contained falsehoods material to a fraud against it started the statute running as to the signers of the letter, including Lowry. Similarly, Lowry, as KRC's general counsel and legal advisor to King during the Arctic transaction, had apparently "structured the deal" and prepared instruments evidencing the fake sale. When Ohio knew this much the statute began running as to Lowry, even though Ohio did not know if Lowry's work on the sale was willful or merely negligent. Although *scienter* is a necessary element of § 10(b) private actions, *Ernst & Ernst v. Hochfelder, supra,* in many cases *scienter* will emerge only as an inference from the facts before the jury. This circumstance cannot be used as a basis for emasculating the statute of limitations. Discovery for equitable tolling purposes must not, therefore, be equated with proof of each and every element of plaintiff's case.

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[17] Appellant points out that the stays of discovery imposed by the court below left it only a total of 16 months broken into two segments before the running of the statute as reckoned by the trial court. If compulsory process were Ohio's only means of gathering the facts necessary to identify appellees as appropriate defendants and to draft a complaint, our result today might be different. The record, however, shows that ample information for these purposes was available to appellant from papers filed in other lawsuits and from public sources. Had appellant's complaint been filed within the limitations period, there is no reason to doubt that the court below would have permitted reasonable discovery before trial.

We conclude that there is sufficient support in the record to uphold the district court's order and that there was no abuse of discretion. Accordingly, the judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

STATE OF OHIO
Plaintiff-Appellant,

v.

PETERSON, LOWRY, RALL, BARBER & ROSS, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. Civil Case No. 76-F-992)

J. Vernon Patrick, Jr., (Thomas J. Gallo and William R. Sylvester, with him on the brief) of Berkowitz, Lefkovits & Patrick, Birmingham, Alabama; (and Harry L. Hobson and William J. Baum, Jr. of Holland & Hart, Denver, Colorado, with him on the brief), for Plaintiff-Appellant.

Robert H. Wheeler (Donald J. McLachlan and John W. Treece, with him on the brief) of Isham, Lincoln & Beale, Chicago, Illinois; (and Jeffrey A. Hyman, Denver, Colorado, with him on the brief), for Defendants-Appellees Peterson, Ross, Rall, Barber & Seidel and individually-named defendants-appellees except Timothy G. Lowry.

Mitchell A. Orpett (Donald M. Haskell and James J. Widland, with him on the brief) of Haskell & Perrin, Chicago, Illinois; (and Raymond J. Connell of Yegge, Hall & Evans, Denver, Colorado, with him on the brief), for Defendant-Appellee Timothy G. Lowry.

Before SETH, Chief Judge, McKAY, Circuit Judge, and PALMIERI, District Judge[*].

PALMIERI, District Judge.

The State of Ohio appeals from a summary judgment dismissing its action in securities fraud as barred by the statute of limitations. Ohio brought this action under § 20 and § 10(b) of the Securities Exchange Act of 1934[1] against Peterson, Lowry, Rall, Barber & Ross, a Chicago law firm, and Timothy G. Lowry, a former member of that firm, on October 7, 1976 in the District of Colorado. The district court found, in a thorough opinion, after permitting Ohio to amend its complaint and after a full opportunity for discovery had been afforded the parties,[2] that the applicable three-year statute of limitations had run. This decision followed an earlier appellate disposition in the case by this court which resolved certain procedural problems but left the limitations question open for decision on a fresh record. *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 585 F.2d 454 (10th Cir. 1978).

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[*] The Honorable Edmund L. Palmieri, Senior Judge of the United States District Court for the Southern-District of New York, sitting by designation.

[1] While the appellant also made a claim under § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q, it is not of any significance for the purpose of our analysis because of the substantial similarity between this statute and Rule 10b—5 under the Securities Exchange Act of 1934. Moreover, there is considerable doubt as to whether a private right of action exists under § 17(a) of the 1933 Act. See *Woods v. Homes & Structures of Pittsburg, Kansas*, 489 F.Supp. 1270, 1284—88 (D.Kan. 1980), where the court reviewed conflicting authorities in detail and came to the conclusion that no private action exists. The Supreme Court has not yet resolved the issue. See *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 689 (1980). Our decision today with respect to § 10(b) of the 1934 Act would apply equally to § 17(a) of the 1933 Act, if a private cause of action were assumed to exist under the latter statute.

The Factual Background

On April 17 and May 1, 1970, Ohio bought two promissory notes of King Resources Company (KRC) for a total of $8 million as part of its investments in commercial paper. Each had a two-year maturity. KRC was involved in oil, gas, and other natural resource ventures. Its bankruptcy in 1971 entailed creditor and investor losses of many millions of dollars. On November 16, 1970, the Securities and Exchange Commission filed a complaint in the Southern District of Ohio against the broker who handled the sale of the notes to Ohio and also against KRC, John M. King (KRC's founder, former chairman and major stockholder), and numerous others, alleging fraud in the sale of KRC securities. *SEC v. Crofters,* 351 F. Supp. 236 (S.D. Ohio 1972). On the basis of the S.E.C.'s complaint, later in 1972 Ohio brought an action in securities fraud against fifteen defendants, including KRC, John M. King, and KRC's accounting firm. *See Ohio v. Crofters,* 75 F.R.D. 12 (D.Colo. 1977). Both *SEC v. Crofters* and *Ohio v. Crofters* dealt with the same transactions which form the basis of the case at bar.

At the time of the fraud alleged in *Ohio v. Crofters,* the appellee law firm represented KRC, and appellee Lowry was

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[2] Although Ohio complains that its right of discovery had been severely restricted in this case, it nevertheless reviewed over 6,000 documents from appellees' files and obtained copies of some 1,500 pages, in addition to taking depositions of Lowry and Herbert C. Loth, Jr., a member of the Peterson firm.

KRC's general counsel and a member of its board of directors.[3] There appears to be no doubt that King dominated and controlled KRC and that Lowry was closely involved with him in numerous transactions. Although Ohio failed to join appellees as defendants, their possible role in frauds involving KRC did not escape other plaintiffs. Lowry and the firm were named as defendants in at least eleven other suits concerning KRC. Many of these suits were consolidated with *Ohio v. Crofters* after it was transferred by the Judicial Panel on Multi-district Litigation to the District of Colorado on November 17, 1972. *See In re KRC Securities Litigation*, 352 F. Supp. 975 (J.P.M.L. 1972).

Exhibits in the record indicate that the KRC lawsuits received extensive publicity almost from the time of the initial collapse of KRC. Lowry was prominently mentioned in a number of such articles. The publications included the nationally circulated *Wall Street Journal* and local newspapers in Ohio, Texas and Colorado.

Internal memoranda from the Ohio Attorney General's office produced on discovery reveal that Lowry's possible involvement had come to the attention of Ohio's lawyers in 1972 or early in 1973. A note from the Ohio files made by Richard N. Patterson, then an Assistant Attorney General, refers to Lowry as "active in the inflation"—presumably a reference to the fraudulent inflation of KRC's stated assets. A

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[3] Ohio's claim against the firm is based primarily if not entirely upon vicarious liability for Lowry's acts. Though other firm members were named as individual defendants, we find no issue on this appeal which depends upon independent liability of the firm or any of its members. In our discussion below, any references to the acts of Lowry must be understood to apply equally to the firm. Additionally, it is emphasized that neither this court nor the court below has made any adjudication on the merits of the various claims of fraud, concealment, and other actions attributed to Lowry. Any discussion of these matters in this opinion must be understood to refer to claims or allegations and not to findings of fact or conclusions of law by this court.

June 1973 memorandum reflects a call received by the Attorney General's office about Ohio's willingness to settle a claim against Lowry's director's liability policy.[4]

An involuntary petition in bankruptcy had been filed against KRC on August 18, 1971, in the Northern District of Texas. After venue was changed to the District of Colorado, the trustee in bankruptcy, acting on behalf of KRC's creditors, applied for permission to sue Lowry and the Peterson firm. Ohio was a major creditor and active participant in the bankruptcy proceeding. The trustee's proposed complaint, filed in the bankruptcy proceeding on August 21, 1973,[5] alleged that Lowry and the firm had conspired to defraud KRC of $1.1 million from December of 1968 through October of 1970—the period during which Ohio had purchased its KRC notes.

Ohio argues that the statue of limitations in its fraud action against appellees should be tolled until January 5, 1976, the date when Ohio claims it first discovered the fraud by Lowry and the firm. Ohio says that on this date Lowry revealed in a deposition that a sale which he had certified in 1970 as genuine was in fact subject to a secret buy-back agreement, a copy of which Lowry had hidden in his firm's safe in Chicago and later destroyed. Ohio, noting that it could not have deposed Lowry earlier because of a court-imposed stay of discovery, claims that despite its diligence it could not have known of Lowry's involvement[6] until Lowry's deposition. Appellees offer a different explanation for Ohio's delay. They note that Patterson, referring to the KRC bankruptcy proceeding in an internal memorandum of the Attorney General's office dated April 11, 1973, said that "our negligence in this case is stunning," and added: "I cannot emphasize more strongly . . . the fiasco further apathy might engender."

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[4] Ohio's present claim under § 20, 15 U.S.C. § 78t, relates to Lowry's statutory liability as a director of KRC.

[5] The court below chose this date as the point at which, "given all the other information which Ohio had, the conclusion is irresistible that, in the exercise of due diligence, Ohio should have realized that its cause of action embraced Mr. Lowry and his law firm." On this basis, Ohio's action would be barred after August 21, 1976, a month and a half before Ohio filed the present action.

I.

Since there is no federal statute of limitations applicable to private actions under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and S.E.C. Rule 10b-5 promulgated thereunder, the limitations period is supplied by the law of the forum state. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 210 n.29 (1976). The district court held that the applicable state statute was Colo.Rev.Stat. § 13-80-109 (1973), and that ruling has not been appealed. Section 13-80-109 provides: "Bills of relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud, and not afterwards."

The rule in this circuit has been that in fraud cases only the limitations *period* is borrowed from state law, whereas the tolling rule is supplied by federal jurisprudence. *Esplin v. Hirschi,* 402 F.2d 94, 103 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969). As we noted not long ago, *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 (10th Cir. 1980), the *Esplin* rule appears to conflict with certain language in *Board of Regents v. Tomanio,* 446 U.S. 478 (1980). There, the Supreme Court held that under the borrowing statute for federal civil rights cases, 42 U.S.C. § 1988, a federal judge was barred from exercising equitable power to toll the limitations period where the borrowed state statute contained no provision for tolling under the circumstances presented and further provided: "No court shall extend the time limited by law for the commencement of an action." *Id.,* 446 U.S. at 486. Section 1988 applies only to the civil rights provisions of Title 18 and Title 42, United States Code. There is no analogous borrowing statute applicable to implied private actions under the securities Exchange Act of 1934. To apply the *Tomanio* rule by analogy to cases where federal courts borrow a state limitations period as a matter of judicial convenience would in effect overrule[7] *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), a decision whose continuing vitality is attested by the many cases relying upon it in § 10(b) private actions.[8] We do not believe the Supreme Court intended that such a significant consequence should be attached *sub silentio* to its decision, especially since the precedents cited by the Court in *Tomanio* all deal with civil rights cases under § 1988. *Board of Regents v. Tomanio, supra,* 446 U.S. at 483.

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[6] Ohio claims late discovery only of Lowry's personal role in the bogus sale. Ohio knew of the fraudulent nature of the sale itself no later than 1972.

Another reason for standing by our decision in *Esplin v. Hirschi* is the question (left unanswered by *Tomanio*) of how deeply into state case law a federal court deciding a federal cause of action must go in order to borrow a state limitations period. *Tomanio* stays within the four corners of the state statute. Here, however, Colo.Rev.Stat. § 13-80-109 computes the limitations period from plaintiff's discovery of the fraud without any requirement that plaintiff exercise reasonable diligence. For the diligence requirement, one must look to Colorado decisions. *Greco v. Pullara*, 166 Colo. 465, 444 P.2d at 383 (1968). Similarly, one question we must resolve in this case concerns the respective roles of judge and jury on the issue of diligence. Colorado law would apparently leave it to a jury. *Owens v. Brochner*, 172 Colo. 525, 474 P.2d 603 (1970); *Norton v. Leadville Corp.*, —Colo.App.—, 610 P.2d 1348 (1980). We think, however, that the law of plaintiff's diligence in private actions under § 10(b) can better develop by reference to other federal securities cases rather than by analogy to Colorado decisions on the diligence of plaintiff in discovering grounds for an action in medical malpractice. *See Owens v. Brochner, supra*, (brain tumor); *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944) (sponge sewn into plaintiff's abdomen).

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[7] We note that the state statute before the Court in *Holmberg*, a predecessor of the New York statute involved in *Tomanio*, provided: "A court or judge is not authorized to extend the time fixed by law within which to commence an action . . ." § 99(1), N.Y. Civil Practice Act of 1920, as amended by 1938 N.Y. Laws c.112.

[8] *See e.g., Gaudin v. KDI Corporation,* 576 F.2d 708 (6th Cir. 1978); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978); *United California Bank v. Saük*, 481 F.2d 1012 (9th Cir. 1973), *cert. denied,* 414 U.S. 1004 (1973); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972); *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970), *cert. denied*, 400 U.S. 852 (1970); *Hooper v. Mountain States Securities Corporation,* 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1963).

The tolling of the three-year statute of limitations applicable to this case, therefore, is to be determined under the principles announced by the Supreme Court in *Holmberg v. Armbrecht, supra.*

II.

Federal equitable tolling provides that when a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered . . ." *Bailey v. Glover*, 21 Wall. (88 U.S.) 342 (1875). In *Holmberg*, the Court made clear that the *Bailey* rule applies not only to federal statutes but also to statutes borrowed from the states in federal question cases. The borrowed limitations period does not begin to run "until after [plaintiff] had discovered, or had failed in reasonable diligence to discover, the alleged deception . . ." *Holmberg v. Armbrecht, supra,* 327 U.S. at 397.

Appellant argues that diligence and the time of discovery are necessarily questions for the jury and cannot be decided by the court on a motion for summary judgment. "The question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law." *Aldrich v. McCulloch Properties, Inc., supra*, 627 F.2d at 1042, citing *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168 (10th Cir. 1974), where we held that "in a case such as this" (broker's churning of plaintiff's account) it would be "seldom, if ever, possible for a judge to determine summarily when the injured person . . . became fully aware that he or she had been victimized." *Id.*, at 172. *See also Robertson v. Seidman & Seidman*, 609 F.2d 583, 591 (2d Cir. 1979); *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 8 (5th Cir. 1967).

Another line of cases, however, supports summary disposition. In at least one § 10(b) case since *Dzenits* we have affirmed a summary judgment for defendant on the issue of discovery. *Jones v. Ford Motor Co.*, 599 F.2d 394 (10th Cir. 1979). Many cases from other circuits have affirmed summary judgment for defendant on discovery or diligence, using a variety of legal theories.[9]

In view of these conflicting precedents, we have found it helpful to consider the origins of equitable tolling. Early English statutes of limitation provided that "no person shall sue, have or maintain any writ" after a specified time. 32 Hen.VIII c.2 (1540). Since the statute did not apply to chancery, however, a party with no remedy at law because of the statutory bar could sue out a bill in equity. But to win the chancellor's favor, the suitor would have to show by clear and convincing proof that he had been diligent and faultless in pursuit of his rights.[10] Thus the U.S. Supreme Court, in announcing that the limitation provision of the federal bankruptcy statute could be tolled by a federal judge on equitable grounds, made clear that tolling could occur only where plaintiff's delay was without "fault," "want of diligence or care," "negligence" or "laches." *Bailey v. Glover, supra,* at 349-50. In equity the issue of diligence was decided by the chancellor often on written petitions as opposed to live testimony—a procedure much like our summary judgment under Fed.R.Civ.P. Rule 56.

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[9] *See, e.g., Gaudin v. KDI Corp.*, 576 F.2d 708, 712 (6th Cir. 1978) (as a matter of law, plaintiff should have inferred fraud from precipitous decline of stock, other lawsuits, etc.); *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977) (plaintiff could have discovered fraud from defendant's admissions in S.E.C. release and the listing of defendant as 'in peril' by stock exchange); *Goldstandt v. Baer, Stearns & Co.*, 522 F.2d 1265 (7th Cir. 1975) (plaintiff should have sought independent legal advice); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975) (plaintiff should have discovered fraud in light of stock's precipitous decline and other lawsuits); *Hupp v. Gray*, 500 F.2d 993 (7th Cir. 1974) (plaintiff's affidavits failed to show actual diligence); *Klein v. Shields & Co.*, 470 F.2d 1344, 1346-7 (2d Cir. 1972) (at least the possibility of fraud should have been apparent from earlier lawsuit).

In 1833, Parliament enacted a statute providing that actions in fraud shall be "deemed to have accrued at, and not before, the time at which such fraud shall or with reasonable diligence might have been discovered . . ."[11] 3&4 Wm.IV c.27 § 26. Many legislatures in the United States followed the English example during the 19th century, apparently intending to do no more than codify the equitable doctrine and make it applicable to the law courts. But a consequence of codification was that accrual became an element of a statutory defense and thus had to be proved in a jury trial. Meanwhile, the equitable rule subsisted side by side with the new statutes, and even extended in some cases to actions at law, at least in federal cases where a statutory tolling provision was lacking. "We see no reason why the principle [of equitable tolling] should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side." *Bailey v. Glover, supra,* at 349.

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[10] Equity's requirement that plaintiff prove *actual* diligence has survived in a few modern federal cases. *See, e.g., Arneil v. Ramsey, supra,* at 781; *Hupp v. Gray, supra; Morgan v. Koch,* 419 F.2d 993, 996 (7th Cir. 1969). *But see Goldstandt v. Baer, Stearns & Co., supra,* at 1268.

[11] The Statute of William is perhaps the source of the modern test based upon hypothetical as opposed to actual diligence.

Despite the union of law and equity, the distinction has continuing significance in federal civil actions on the question of trial by jury, since the Seventh Amendment does not apply to claims within equity jurisdiction. *Parsons v. Bedford,* 3 Pet. (28 U.S.) 433, 447 (1830). *See also Pernell v. Southall Realty,* 416 U.S. 363, 374-6 (1974); *Curtis v. Loether*, 415 U.S. 189, 192-4 (1974); *Ross v. Bernhard*, 396 U.S. 531 (1970). When federal courts imply a private right of action under a federal statute, they must frequently decide whether the remedy sought is of legal or equitable nature.[12]

In view of the equitable origin of the tolling doctrine, we think there remains some room for discretion by the court on the issue of plaintiff's discovery and diligence in cases under § 10(b) when the pleadings show that the action would be time-barred but for the equitable doctrine. In the cases where other circuits have affirmed summary judgment on diligence, the district judges have essentially decided the tolling issue in the manner of chancery.[13] We think that such discretion was proper in the case at bar.

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[12] Cf. *In re Gartenberg*, 636 F.2d 16 (2d Cir. 1980), which held that an action under § 36(b) of the Investment Company Act of 1940, as amended, 15 U.S.C. § 80a-35(b), is equitable in nature and should be tried to the court.

[13] As many authorities have said, the question of whether a plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to determination as a matter of law. *Aldrich v. McCulloch Properties, Inc., supra*, 627 F.2d at 1042; 6 L. Loss, *Securities Regulation*, 3905 (2d ed. Supp. 1969). Nevertheless, trial judges frequently conclude that dismissal *in limine* is the proper disposition of cases such as this, and such dismissal has often been upheld on appeal. Cases like those cited in footnote 9 *supra* cannot be adequately explained as individual determinations of law, each on a question of first impression unique to the particular facts of the case. We think that equitable discretion by the trial court is a better explanation.

III.

Limitations rules have traditionally been cast in terms of a prohibition on the *commencement* of an action.[14] In addition to the general policy favoring repose and the quieting of titles, the statute seeks to relieve defendants of the cost and vexation of protracted litigation and the uncertainty of contingent liabilities. Not only defendants but also the courts have an interest in the timely commencement of actions. The adjudication process is hampered by stale evidence and absent witnesses; the burden on court calendars would instantly increase if actions now time-barred were revived by a new statute or tolling rule.

Any rule which makes the statute of limitations necessarily a jury question defeats the statute's purpose of preventing trials of stale claims. The need to avoid vexatious litigation is especially acute in cases under § 10(b) involving public misrepresentations in the sale of publicly traded securities, an area of the law which readily engenders multiple lawsuits arising out of the same underlying transactions. Contingent liabilities due to unfiled claims create special problems when they involve corporations with publicly traded securities. These problems are compounded by a tolling rule which effectively neutralizes the statute of limitations.

Where, as here, a § 10(b) action alleges substantially the same facts as in prior litigation, summary disposition is appropriate if the documents before the court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such a time as to bar the action. If the documents before the court are not sufficiently persuasive to meet this stringent test, a jury ultimately deciding the facts will determine by a preponderance of the evidence whether the action accrued too remotely. We uphold the trial court's order in this case because we find that it was well supported by the record and was not an abuse of discretion.[15]

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[14] *Compare* 32 Hen. VIII c.2 ("No person shall sue, have or maintain any writ . . .") with Colo.Rev.Stat. § 13-80-109 ("Bills of relief on the ground of fraud shall be filed within three years . . . and not afterward").

IV.

The court below applied the diligence rule as we have stated it here. Appellant, however, claims that a different rule obtains in this case because of its offer to prove that Lowry had concealed a secret buy-back agreement and destroyed it nearly two years after the initial fraud. The *Holmberg* rule, says appellant, applies only to simple fraud; where defendant has taken steps after the initial fraud to prevent its discovery, the statute of limitations is tolled until actual discovery regardless of diligence. Although we find some support for this view, *Robertson v. Seidman & Seidman, supra,* 609 F.2d at 593; *Sperry v. Barggren,* 523 F.2d 708, 711 (7th Cir. 1975); *Tomera v. Galt,* 511 F.2d 504, 510 (7th Cir. 1975), we see no reason why an act of concealment by defendant should excuse plaintiff from his obligation of diligence, which he owes the court as well as his adversaries. Of course, if defendant *successfully* conceals the fraud, the concealment would fool the hypothetical diligent plaintiff and toll the statute. But where, as here, the concealment is insufficient to fool a reasonably diligent plaintiff but nevertheless allegedly prevented discovery by Ohio, the second doctrine of fraudulent concealment urged by appellant would simply give it a second arrow to its bow. We hold, therefore, that there is but one federal doctrine of equitable tolling, as set forth in *Holmberg v. Armbrecht, supra.*[16]

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[15] We feel constrained to stress that our concern today is with frauds based on material misstatements regarding publicly traded securities. It may well be that the trial court's discretion to rule summarily on discovery or diligence should be exercised more sparingly in face-to-face, "private" frauds under § 10(b). *See Aldrich v. McCulloch Properties, Inc., supra; Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra.*

V.

Shortly after appellant filed *Ohio v. Crofters,* that case was consolidated with many other suits involving the same or related facts. The court below had no need to enquire as to whether appellant actually obtained the pleadings and other papers from the actions consolidated with Ohio's, since a diligent plaintiff would obtain such documents and scrutinize them. Similarly, appellant as an active and major participant in the KRC bankruptcy proceeding had constructive if not actual knowledge of all papers filed by the trustee in bankruptcy and responses thereto.

Appellant argues that the complaints filed by other plaintiffs contained mere allegations of fraud by Lowry, and that Ohio cannot be charged with discovery of the fraud until such allegations and suspicions are supported by hard evidence. We disagree. Discovery under the equitable tolling doctrine merely starts the limitations period running. From that point on, appellant had three years[17] to find the minimum support necessary for filing a complaint. After filing it, Ohio would have had more time to develop the evidence and to refine the issues through pre-trial discovery.

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[16] The view that there are two distinct doctrines of tolling perhaps derives from a confusion with earlier versions of the equitable rule requiring plaintiff to prove actual diligence. Such proof was excused if defendant had concealed all cause of reasonable suspicion. The exception is redundant under our test based on hypothetical diligence.

Even if we were to adopt appellant's view of the law, we note that the record would also support a finding of actual discovery by Ohio of facts implicating Lowry in the fraud. We do not reach this point because the court below based its decision on diligence, see footnote 5, *supra*, and we affirm on that basis.

[17] Appellant points out that the stays of discovery imposed by the court below left it only a total of 16 months broken into two segments before the running of the statute as reckoned by the trial court. If compulsory process were Ohio's only means of gathering the facts necessary to identify appellees

Ohio knew no later than 1972 that the "sale" by KRC of certain Arctic land permits was fraudulent. In the exercise of reasonable diligence, Ohio could have learned that KRC's accountants, before writing up KRC's assets on the basis of this sale, had obtained a letter, signed by King and Lowry, certifying that the sale was genuine. A plaintiff's discovery that a document contains falsehoods material to a fraud against him starts the statute running as to the known authors of the document. Lowry was not only a KRC director and KRC's general counsel; he was known to be intimately involved in King's corporate and personal financial dealings at the time of the Arctic land transaction. In view of this, a diligent plaintiff would have joined appellees as defendants because of the likelihood that Lowry had "structured the deal" and prepared instruments evidencing the fake sale. The probability of Lowry's participation in the fraudulent transaction started the statute running as to him, even though Ohio had no proof of *scienter*. Although *scienter* is a necessary element of a § 10(b) private action, *Ernst & Ernst v. Hochfelder, supra*, in many cases *scienter* will emerge only as an inference from the facts before the jury. This circumstance cannot be used as a basis for emasculating the statute of limitations. Discovery for equitable tolling purposes must not, therefore, be equated with proof of each and every element of plaintiff's case.

We conclude that there is sufficient support in the record to uphold the district court's order and that there was no abuse of discretion. Accordingly, the judgment is AFFIRMED.

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as appropriate defendants and to draft a complaint, our result today might be different. The record, however, shows that ample information for these purposes was available to appellant from papers filed in other lawsuits and from public sources. Had appellant's complaint been filed within the limitations period, there is no reason to doubt that the court below would have permitted reasonable discovery before trial.

Opposition

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No. 81-210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OHIO,

Petitioner,

vs.

PETERSON, LOWRY, RALL,
BARBER & ROSS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE OF TIMOTHY G. LOWRY TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review a decision wherein the Tenth Circuit Court of Appeals, in complete accord with accepted standards and rules of law, determined that the multitude of facts before it demonstrated as a matter of law that petitioner (in the position of private investor) had failed to exercise the requisite due diligence which would have enabled it to timely discover its claim and that its action was therefore barred by the statute of limitations.

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In The

Supreme Court of the United States

October Term, 1981

STATE OF OHIO,

Petitioner,

vs.

PETERSON, LOWRY, RALL,
BARBER & ROSS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE OF TIMOTHY G. LOWRY TO PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Petitioner's claim that the Tenth Circuit Court's opinion is in "direct conflict with the decisions of every other Court of Appeals" (Petition, p. 9) is wholly unfounded and without merit. No new standard for summary judgment was articulated or utilized by that court in affirming the order of summary judgment entered against the petitioner. The "clear and convincing" language cited by petitioner related not to summary judgment but to the test applied by the court to determine whether a genuine issue of material fact existed. The multitude of uncontroverted facts on record demonstrated as a matter of law (clearly and convincingly persuaded the trial judge) that no such issue of material fact did exist. The Tenth Circuit Court's opinion properly applied established law.

The Tenth Circuit Court likewise properly applied the due diligence test to petitioner's discovery of its claim. No case cited has ever completely eliminated the requirement that plaintiff exercise due diligence where, as here, the plaintiff had no relationship, correspondence or communication whatsoever with the alleged wrongdoer and where, as here, all other plaintiffs similarly situated were successful in obtaining sufficient information to enable them to timely file their claims against the same defendant. The Tenth Circuit Court's opinion does not, therefore, conflict with those of other circuits.

The Tenth Circuit Court correctly applied the federal tolling rule in that this Court's decision in *Board of Regents v. Tomanio,* 466 U.S. 478 (1980) is not applicable to federal securities actions and in that, even if the

Colorado tolling rule should have been applied, the Colorado rule is identical to the federal tolling doctrine. Therefore, the opinion of the Tenth Circuit Court of Appeals does not conflict with any decision of this Court or of any circuit court and Ohio's petition should be denied.

COUNTERSTATEMENT

In violation of the language and spirit of Rule 21(g) of the Rules of this Court, petitioner has infused its "Statement of the Case" with argument, inaccuracy, material omission and irrelevancy. In particular, petitioner's discussion of the "evidence" (Petition, pp. 4-8) attempts to re-argue and re-assert the allegations of its complaint under the cloak of objectivity that is attendant to a proper statement of the case.

The facts which petitioner has neglected to include in its statement are those relied upon by both the District Court of Colorado and the Tenth Circuit Court of Appeals in finding Ohio's claim barred by the statute of limitations. These facts include those within the realm of public knowledge and those possessed by and available to petitioner long before it filed the instant proceeding. Judge Finesilver, in granting summary judgment against petitioner, cited at least nine related lawsuits of which petitioner had notice (Petition, A33, 39) and likewise discussed in some detail petitioner's own memoranda and files which revealed that its own attorney had warned in April 1973 that "our negligence in this case is stunning", (A39) and which indicated that petitioner's chief counsel had received a telephone call in June 1973 (more than three years before petitioner filed its claim against respondent) from respondent's attorney inquiring as to whether petitioner would be amenable to settlement in a related lawsuit. (A39) As the District Court of Colorado stated (and notwithstanding petitioner's recitation of the "facts"):

> These documents speak for themselves. We have relied upon these documents, as well as upon the entire record, in reaching our decision herein. (A39-40)

The Tenth Circuit also devoted considerable attention to the facts of record in affirming the order of the district court. (A59-62) As in the district court, the existence of earlier related lawsuits, the vast publicity attendant thereto, petitioner's memorialized admissions of negligence in following the case and other memoranda were detailed in the circuit court's opinion and cited as a basis for its judgment. (A60-62, 71) Thus, it was based on the entire appellate record and in full conformity with established law that the Tenth Circuit affirmed the district court's order granting respondents' motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. (A71)

Despite the fact that two courts, each having the full record before it, have ruled that petitioner's action is barred, as a matter of law, Ohio has again attempted to create otherwise nonexistent factual issues by composing an inaccurate and argumentative statement of the case. Despite petitioner's suggestions to the contrary, what is at issue here is whether this Court should review the opinion of the Tenth Circuit Court of Appeals which held that petitioner had, as a matter of law, failed to exercise the requisite due diligence which would have allowed it to timely discover its claim and which therefore ruled, after review of the entire record, that the instant proceeding was barred by the statute of limitations.

Petitioner is before this Court as an allegedly defrauded private investor which has been found by the courts below to have failed to meet the due diligence standards which would allow for the tolling of the statute of limitations. The findings and judgment of the courts below present no conflict with United States Supreme or circuit court decisions, or with the decisions of any state supreme court. There were no departures from the accepted and usual course of judicial proceedings. There are no legal questions or matters of public interest meriting the attention of this Court and Ohio's petition for a writ of certiorari should therefore be denied.

ARGUMENT

A.

THE TENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED ESTABLISHED LAW GOVERNING MOTIONS FOR SUMMARY JUDGMENT AND IN NO WAY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS FOR SUMMARY JUDGMENT.

In its petition, Ohio rails repeatedly against the Tenth Circuit's statement that:

> Where, as here, a §10(b) action alleges substantially the same facts as in prior litigation, summary disposition is appropriate if the documents before the court clearly and convincingly persuade the trial judge that plaintiff in the exercise of reasonable diligence would have discovered the fraud at such a time as to bar the action. (A68)

Ohio's objection to this language is that it does not accurately state the standards governing summary judgment under Rule 56 of the Federal Rules of Civil Procedure. (Petition, pp. 9, 10, 11, 12, 13 18) By selectively editing the court's discussion so as to take it completely out of its proper context, Ohio attempts to convince this Court that the Tenth Circuit was applying a "clear and convincing" test to the evidence in determining whether the district court's grant of summary judgment was proper rather than the "genuine issue of material fact" criterion established by Rule 56. It is clear from the court's discussion, however, that the point in issue was *not* the proper standard for summary judgment; but rather, the requirements for tolling the statute of limitations. Thus, despite the fact that Ohio has the burden of showing that a genuine issue of material fact exists as to whether it is entitled to the equitable relief tolling imparts, *Akron Preform Mold Co. v. McNeil Corp.*, 496 F.2d 230 (6th Cir. 1974), the Tenth Circuit applied the "stringent test" of requiring *respondents* to "clearly and convincingly persuade the trial judge" that Ohio, in the exercise of reasonable diligence would have timely discovered its purported claim. (A68) The burden on Ohio to show that a material factual issue as to tolling exists, and respondents' responsibility to clearly and convincingly persuade the courts below that no such issue is presented by the evidence, are complimentary, consistent and in accordance with established summary judgment, *Gaudin v. KDI Corp.*, 576 F.2d 708 (6th Cir. 1978), and equitable tolling rules. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946).

The Tenth Circuit's opinion does not discuss general summary judgment law, nor does it cite or quote Rule 56 of the Federal Rules of Civil Procedure. No party has questioned the applicability of Rule 56 to the motions filed in the district court. The applicable provisions of that rule and the relevant cases applying that rule were cited and discussed in the trial court's opinion (A38)—an opinion described by the Tenth Circuit as "thorough". (A58) There being no dispute and no issue on appeal as to the burden placed on a party seeking summary judgment, the district court's discussion of that subject did not merit the Tenth Circuit's detailed attention. Petitioner has misstated the nature and focus of the circuit court's analysis.

Similarly, petitioner's citation of a number of cases wherein a circuit court reversed an order of summary judgment (Petition, pp. 13-17) fails to demonstrate that the Tenth Circuit has departed from the accepted course of judicial proceedings in affirming summary judgment below, or that its decision in any way stands in conflict with those cited. Rather, as the Tenth Circuit itself pointed out, while the facts adduced in some cases do not support summary judgment on the issues of diligence or discovery of one's claim, another line of cases supports summary disposition. (A65 and cases cited in note 9 therein); *Jones v. Ford Motor Co.*, 599 F.2d 394 (10th Cir. 1979). The different results in these cases do not demonstrate a conflict in the legal standard applied by the courts but only that the propriety of summary judgment depends on the facts of each case. The Tenth Circuit, after reviewing the complete record on appeal and finding no genuine issue of material fact, ruled that respondents were entitled to summary judgment as a matter of law. Other courts which have reviewed cases with similar facts—the existence of other related lawsuits, a precipitous decline in stock and widespread publicity—are in accord with the result below. *See Gaudin v. KDI Corp.*, 576 F.2d 708 (6th Cir. 1978); *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402 (2d Cir. 1975).

In its petition, Ohio also raises certain factual arguments which it maintains were improperly considered by the Tenth Circuit. (Petition, pp. 17-21) Each of these arguments was presented in great length by petitioner—in its two memoranda and in oral argument in the district court, in its two appellate briefs and in oral argument before the Tenth Circuit Court of Appeals and in its two petitions for rehearing before the same appellate court. In each instance, the court, having before it the full record of facts in evidence and, in each instance stating that the issue of the propriety of summary judgment was before it, ruled that there were *no* genuine issues of material fact and that summary judgment was proper as a matter of law. (*See, e.g.*, A38) As the district court noted:

> Plaintiff cannot, in these circumstances, be heard properly to seek equitable relief in this court from the statute of limitations. Common sense rebels at the notion that Ohio, a sophisticated investor with $8,000,000 at stake, could have remained in ignorance as long as it did. Common sense likewise rebels at the notion (so strenuously argued by Ohio) that a general fraudulent scheme of such large proportions as this could be rendered undiscoverable by any alleged concealment of a single part.
>
> This is a case in which plaintiff waited six years from the time its cause of action accrued before bringing suit. We are satisfied that the instant case is more than appropriate for summary disposition. (A40-41)

Based on the expansive record on appeal and the careful deliberations of the courts below, it is clear that no compelling reason for issuing a writ of certiorari exists.

B.

THE TENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE LAW RELATING TO DISCOVERY OF PURPORTED FRAUD. ITS OPINION DOES NOT CONFLICT WITH THOSE OF OTHER CIRCUITS.

Petitioner would have this Court issue a writ of certiorari because the Tenth Circuit refused to toll the statute of limitations until the date Ohio claims to have *actually* discovered the respondents' purportedly fraudulent conduct. (A10, 21-23) Petitioner relies on *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975) and *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979).

This Court has long held that where a party allegedly injured by fraud remains in ignorance of that fraud *without any fault or want of diligence or care on its part*, the bar of the statute does not begin to run until the alleged fraud is discovered. *Bailey v. Glover*, 88 U.S. 342 (1875); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946).

This long-established rule has never been abrogated. Even *Tomera* and *Robertson*, the only cases relied upon by petitioner, fit within that general principle. As the Tenth Circuit stated:

> Of course, if defendant *successfully* conceals the fraud, the concealment would fool the hypothetical diligent plaintiff and toll the statute. (A69)

Tomera involved a case which was filed merely four months after the statute of limitations had run. Unlike the instant action (filed almost 6½ years after the statute began to run), in *Tomera* all other plaintiffs similarly situated had been diligent in investigating the alleged fraud but had been unsuccessful in obtaining information which constituted a legitimate basis for a lawsuit. Under these circumstances, the Seventh Circuit Court of Appeals believed it unnecessary for Tomera to prove her own diligence by *personally* repeating the action taken by another plaintiff when it was clear that such investigation would be fruitless. Therefore, the *Tomera* court tolled the statute of limitations until plaintiff's actual discovery of the *successfully* concealed fraud.

Similarly in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), the plaintiff had participated in an earlier action based on the same transaction, but neither he nor anyone else knew of the alleged wrongdoing. In the instant case, there was no such concealment of the alleged fraud and the plaintiffs in all of the other cases with which this action was consolidated were able to timely file suit.

In the case at bar, all other similarly situated plaintiffs did discover sufficient information to allow them to file suit. Only Ohio chose to close its eyes to the activity surrounding it and failed to timely file its claim. In such circumstances, diligence by petitioner is still required. No evidence of any such due diligence giving rise to an issue of material fact was ever presented by Ohio in the courts below.

Additionally, as the District Court of Colorado ruled, even if there were fraudulent concealment as to that part of the alleged general fraudulent scheme complained of by petitioner, "this would not toll the statute as to all other non-concealed acts which should have put Ohio on notice that it had a claim against [respondents]". (A37) Therefore, even if a new rule of law such as that espoused herein by petitioner were adopted, this would not excuse petitioner's absence of due dilgence with respect to all other portions of the alleged general fraudulent scheme.

No court has ruled that a plaintiff having no relationship, correspondence or communication with the defendant at any time, where other purported victims of defendant's alleged fraud had timely filed suit against said defendant, can ignore all that is going on around it and proceed at its own leisurely pace and at its own selected time. Ohio stands before this Court in precisely that position, where its negligence in following its case is, by its own admission, "stunning".

Petitioner failed to raise any issue of material fact which would demonstrate due or reasonable diligence; and the courts below, in accordance with the law as articulated by this Court, granted summary judgment in favor of the respondents. There is no basis for this Court to review that judgment by issuing a writ of certiorari.

C.

THE TENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE FEDERAL TOLLING RULE TO PETITIONER'S ALLEGATIONS OF FRAUD BROUGHT UNDER FEDERAL LAW. ITS DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR THE CIRCUIT COURTS.

Petitioner maintains that this Court's recent decision in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), required the Tenth Circuit to apply the Colorado tolling rule to Ohio's claims under federal securities law. (Petition, pp. 25-26) Petitioner also contends that the Colorado tolling rule would suspend the running of the statute of limitations until such time as plaintiff actually discovers the individual's alleged wrongdoing. (Petition, p. 25)

Neither of petitioner's contentions is correct. In *Tomanio*, this Court ruled that when state statutes of limitations were applied to federal civil rights actions brought under 42 U.S.C. §1983, state tolling rules should also be applied. This ruling was based in large part on the existence of a borrowing statute, 42 U.S.C. §1988, which provides that resort to state law should be made where the laws of the United States are not adapted to the object, or are deficient in the provision necessary to furnish suitable remedies and punish offenses against the law. No such statutory borrowing provision mandates the imposition of state tolling rules to actions under federal securities law.

Tomanio is also based in large part on the perceived absence of federal procedural rules governing federal civil rights actions. This void, discussed in greater detail by this Court in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), is not present in cases involving federal securities law. As such, the rationale for borrowing the state tolling doctrine in such cases disappears and there is therefore no basis for extending the *Tomanio* rule to securities claims.

Additionally, as the Tenth Circuit reasoned, extending *Tomanio* to this and other securities cases so as to require the courts to borrow the state tolling rule, would effectively overrule the holding of this Court in *Holmberg v. Armbrecht*, "a decision whose continuing vitality is attested by the many cases relying upon it in §10(b) private actions". (A63 and note 8 therein) The particular deficiencies of the federal civil rights statutes addressed by this Court in *Tomanio* do not exist with regard to the federal securities law, under which petitioner brought the instant action. Accordingly, the *Tomanio* rule is inapplicable to this case and the Tenth Circuit was correct in applying the federal tolling doctrine to this case below.

Even if this Court wishes to expand the parameters of the *Tomanio* rule and hold it applicable to §10(b) private actions as well, the Court need not reach that issue in this case because the federal tolling doctrine is identical to that of the State of Colorado. *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036 (10th Cir. 1980). Both federal and Colorado doctrines toll the statute of limitations only until such time as the aggrieved party discovers or, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud. *Id.; See also, Herald Company v. Seawell*, 472 F.2d 1081, 1098, n. 24 (10th Cir. 1972); *deHaas v. Empire Petroleum Company*, 435 F.2d 1223, 1226, n. 3 (10th Cir. 1970).

The Colorado Supreme Court's decisions are consistent with this doctrine. While petitioner relies on one 46 year-old case, *Rogers v. Rogers*, 96 Colo. 473, 44 P.2d 909 (1935) which, involving a face-to-face fraud, adopts an analysis similar to the court in *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975), discussed *supra* at p. 10, every Colorado Supreme Court case since *Rogers* has required the plaintiff to demonstrate due diligence before the statute of limitations would be tolled. *Greco v. Pullara*, 166 Colo. 465, 444 P.2d 383 (1968); *Wright v. Nelson*, 125 Colo. 216, 242 P.2d 243 (1952); *Parsons v. Shackleford*, 117 Colo. 545, 188 P.2d 587 (1948); *Bowman v. May*, 102 Colo. 417, 80 P.2d 327 (1938).

Thus, it is evident that the Tenth Circuit and Colorado courts have been consistent in holding that the application of the federal or Colorado tolling doctrine renders the same result. Because there is no significant difference between the operation of these rules, this Court need not determine whether the specific rule announced in *Tomanio* was intended to apply to securities actions. Under either the Federal or Colorado tolling doctrines, petitioner is barred, as a matter of law, from asserting the instant claim. As such, Ohio's petition for a writ of certiorari should be denied.

CONCLUSION

For all of the reasons stated above, this Court should deny Ohio's petition for a writ of certiorari.

Respectfully submitted,

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Opposition

2

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CLERK

No. 81-210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OHIO,
Petitioner,

vs.

PETERSON, LOWRY, RALL, BARBER & ROSS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The following questions are presented:

1. Whether the United States Court of Appeals for the Tenth Circuit properly affirmed the District Court's grant of summary judgment for defendants under Rule 56, Fed. R. Civ. P., where the District Court held that on the basis of undisputed facts in the record, no genuine issue of material fact exists as to whether the plaintiff knew or, in the exercise of due diligence, should have known of the existence of its cause of action more than three years before filing the complaint.

2. Whether the Court of Appeals for the Tenth Circuit was correct when it used the standards applied by every other Court of Appeals to conclude that the statute of limitations was not tolled when the plaintiff, in the exercise of due diligence, should have known of its cause of action more than three years before filing the complaint, when the plaintiff had totally failed to exercise due diligence in pursuing its cause of action, and when the District Court had specifically found that plaintiff had actual knowledge of its cause of action more than three years before it filed this suit?

3. Whether the Court of Appeals for the Tenth Circuit was correct when it followed *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), in applying federal law on the issue of when the statute of limitations begins to run in an action brought under the Securities Exchange Act of 1934 and the Securities Act of 1933?

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceedings in the Court of Appeals for the Tenth Circuit:

State of Ohio, ***petitioner (plaintiff-appellant below);***

Peterson, Lowry, Rall, Barber & Ross,
Peterson, Ross, Rall, Barber & Seidel,
Timothy G. Lowry,
Herbert C. Loth, Jr.,
Abe R. Peterson,
Owen Rall,
Henry P. C. W. Barber,
Richard V. Henry, Jr.,
Gerhard E. Seidel,
J. Haydon MacDonald,
Elroy C. Sandquist, Jr.,
Irving G. Swenson,
Robert G. Schloerb,
Theodore J. Tsoumas,
J. Robert Geiman,
Thomas K. Peterson,
John G. Campbell,
Peter M. Sfikas,
Robert S. Milnikel,
Richard S. Borland,
Russell M. Pelton, Jr., ***respondents (defendants-appellees below).***

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No. 81-210

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF OHIO,

Petitioner,

vs.

PETERSON, LOWRY, RALL,
BARBER & ROSS, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondents, Peterson, Ross, Rall, Barber & Seidel, its predecessor firm, and all individually named defendants, except Timothy G. Lowry, submit this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit filed by the State of Ohio.

OPINIONS BELOW AND JURISDICTION

Respondents adopt those portions of the Petition entitled "Opinions Below" and "The Jurisdiction of this Court" but add that the opinion of the Court of Appeals entered on April 24, 1981 is reported at 651 F. 2d 687.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondents adopt the portion of the Petition entitled "Constitutional Provisions, Statutes and Regulations Involved."

STATEMENT OF THE CASE

On April 17, 1970 and May 1, 1970, Petitioner, the State of Ohio ("Ohio"), purchased in a private transaction two promissory notes issued by King Resources Company ("KRC") in the amounts of $3,000,000 and $5,000,000, respectively.

Six and one-half years later and well after the legal limitations period had run, on October 7, 1976, Ohio filed a complaint under Sections 20 and 10(b) of the Securities Exchange Act of 1934 and Section 17(a) of the Securities Act of 1933 in the United States District Court for Colorado against the Chicago law firm of Peterson, Ross, Rall, Barber & Seidel, its predecessor firm, and individually named partners of the firm (the "Peterson defendants") and against Timothy G. Lowry ("Lowry"), a former partner of the firm. The complaint alleges that the defendants, through letters, opinions, or inaction, assisted other persons in disseminating false and misleading information concerning KRC's financial condition and business dealings to potential investors, including Ohio.[1]

---

[1] Although Ohio begins its statement of fact by saying that it "was defrauded in connection with its purchase" of the KRC notes, the truth is that despite a decade of litigation, none of the defendants has ever been found to have violated any securities law with respect to the sale or issuance of any KRC security. Moreover, neither the District Court nor the Court of Appeals decided in the proceedings below that the privately purchased KRC promissory notes in question here are "securities" within the meaning of the federal statutes under which Ohio sues.

The complaint Ohio filed on October 7, 1976 is virtually identical to the complaint Ohio filed four and one-half years earlier, on April 17, 1972, *Ohio* v. *Crofters*, 72-138 (S. D. Ohio), against various persons and entities for alleged securities law and common law violations in connection with the same promissory note purchases which underlie its claims here. The only substantive difference between the complaints is that the 1976 complaint alleges the existence of a so-called "side-agreement" relating to the sale of certain Arctic Permits in which Lowry is alleged to have been involved; i.e., Ohio alleges a new piece of evidence pertaining to the alleged fraud which it has been pursuing since it filed *Ohio* v. *Crofters* in 1972.

Ohio has never claimed the defendants were directly involved in Ohio's purchase of the two KRC notes. Indeed, Ohio's claims against the defendants rest upon no connection unique to Ohio's purchase of the notes, but on an alleged broader fraudulent scheme generally affecting KRC's stated financial condition.

On March 25, 1977, the District Court granted the defendants' motions to dismiss on the ground that the action was barred by a three-year statute of limitations.[2]

On October 18, 1978, the Court of Appeals for the Tenth Circuit reversed the District Court's ruling on the ground that the court had considered matters outside the pleadings, converting the motions to dismiss into motions for summary judgment, but had failed to give the parties notice of this changed status and an opportunity to "present to the Court all material made pertinent to such motion by Rule 56." (A-19).[3]

---

[2] Footnote 2 of the Petition filed before this Court incorrectly states that none of the parties contested the decision of both the District Court and the Court of Appeals that the three-year statute of limitations contained in Colo. Rev. Stat. § 13-80-109 applied to Ohio's federal law claims. In fact, Respondents contended before both courts that the two-year statute of limitations contained in Colo. Rev. Stat. § 11-51-125(5) is the appropriate statute of limitations.

[3] Citations to decisions below are referenced to the Appendix to the Petition.

On remand, the District Court ordered Ohio's action reinstated "in the same posture as it was on March 25, 1977," and notified the parties of its intent to treat the pending motions to dismiss as motions for summary judgment. Ohio then engaged in extensive discovery on the issue of the defendants' alleged fraudulent concealment and was allowed to amend its complaint and submit accompanying affidavits over defendants' objections. On June 18, 1977, the District Court, after earlier oral argument, granted defendants' motions for summary judgment.

Although the District Court found that Ohio had actual knowledge of its cause of action against the defendants no later than 1973, the court based its decision solely on the ground that there was no genuine issue of material fact with respect to Ohio's constructive knowledge of its cause of action; i.e., Ohio, in the exercise of due diligence, should have known of its cause of action prior to October 7, 1973. The courts below did not address the issue of whether there was concealment of Ohio's cause of action, but held that the record compelled summary judgment, even if concealment were assumed.

On April 24, 1981, the Court of Appeals affirmed the District Court's decision, finding it "well supported by the record."

The record shows that numerous events occurring between the spring of 1970 and October 7, 1973 put Ohio on constructive and actual notice of the claims against Lowry and/or the Peterson defendants which it now asserts. In fact, all of the charges Ohio now makes against Lowry and the Peterson defendants were, more than three years prior to October 7, 1976, matters of public record in other lawsuits and the subject of widespread media publicity in the *Wall Street Journal* and local newspapers in Ohio, Texas and Colorado.

On January 25, 1971, the Securities Exchange Commission filed a complaint in *S.E.C.* v. *King Resources Company, et al.*, C-2858 (D. Colo.), charging that the defendants, including Lowry, then a partner of the Peterson firm, violated various provisions of the federal securities law in connection with alleged misleading statements concerning KRC finances.

On February 9, 1971, KRC agreed to the entry of a permanent injunction restraining it, its officers, directors, employees, agents and *attorneys* from any future securities law violations. On the same day, the Court appointed a Special Counsel to conduct an investigation of KRC to determine whether securities law violations had occurred. Special Counsel's report, filed with the Court on August 23, 1971, concluded that evidence existed which, if proven, would demonstrate violations of securities laws by KRC officers and directors, *including Lowry*. (Special Counsel's report is a public record available from the court's files.) All of this activity received substantial media attention.

In Ohio, a class action was filed against John M. King, Rowland Boucher, and Lowry on August 17, 1971. *Morrell* v. *King*, C-71-805 (N. D. Ohio). The *Morrell* complaint charged that Lowry and others violated the securities laws by disseminating false information about KRC finances—claims similar to those asserted by Ohio in the court below.[4]

On September 28, 1971, another class action was filed in the United States District Court for Colorado on behalf of purchasers of KRC stock and debentures from 1967 to January 25, 1971. *Dietrich Corp.* v. *King Resources Co.*, C-3434 (D.

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[4] Earlier, on June 1, 1971, John M. King had filed his personal bankruptcy petition, and on August 14, 1977, a Creditor's Petition for Reorganization of KRC was filed in the Northern District of Texas. Both events received national news coverage in the *Wall Street Journal*.

Colo.). The *Dietrich* complaint named Lowry as a defendant, both as a director and as general counsel of KRC, and alleged a general fraudulent scheme in which defendants overstated KRC's financial condition in information disseminated to investors. The *Dietrich* complaint specifically alleged that KRC's investments in the "Arctic Permits" were a sham and that those investments, along with other activities, resulted in inflated reports of KRC's financial condition. Thus, as early as September 1971, Lowry, as counsel to KRC, had been publicly charged with aiding others in disseminating false information based in part on the Arctic Permit transactions.

On October 18, 1971, another major class action, *Bottger* v. *King Resources Co.,* 83-71 (D. N. J.), was filed on behalf of investors in KRC-controlled oil and gas drilling partnerships. The complaint alleged that the Peterson firm and Lowry and Herbert C. Loth, Jr., as members of the law firm, had violated securities laws by preparing false and misleading registration statements and legal opinions. This complaint also received media publicity.

On April 6, 1972, American Employers' Insurance Company sued to rescind director and officer policies it had issued to KRC. *American Employers' Insurance Co.* v. *King Resources Co., et al.,* C-3908 (D. Colo.), named Lowry, as director and general counsel for KRC, as a defendant. Shortly thereafter, Ohio filed its first lawsuit concerning its purchases of KRC notes, *Ohio* v. *Crofters,* 72-138 (S. D. Ohio).

On November 12, 1972, *Ohio* v. *Crofters* was transferred to the United States District Court for Colorado for coordinated and consolidated pretrial proceedings with the *Morrell, Dietrich,* and *Bottger* cases. *In re King Resources Co. Litigation,* 352 F. Supp. 975 (J. P. M. L. 1972).

Ohio's pursuit of its claim can also be compared to the undisputed actions taken by the First National Bank of Denver, which had purchased a $3,000,000 promissory note from KRC in July of 1970—two months after Ohio's second purchase of a KRC note. On May 25, 1973, the Bank filed a securities fraud case against certain KRC officers and directors, including Lowry. *The First National Bank of Denver* v. *King*, C-5045 (D. Colo.). Of particular importance to Ohio's present claim that Lowry's involvement in the Arctic Permit transaction has been fraudulently concealed is the Bank's 1973 allegation that the defendants, including Lowry:

> 16 .... published, or permitted to be published false, incomplete and misleading statements concerning the Arctic permits of King Resources Company. These transactions required disclosure and a different accounting treatment than that given the audited statements appearing in the 1969 Annual Report of King Resources Company and elsewhere.

Thus, by May 25, 1973, plaintiffs in both *Dietrich* and *First National Bank of Denver* had charged Lowry with fraud in connection with the Artic Permit transactions.

On August 21, 1973, the Trustee for KRC filed with the United States District Court for Colorado his complaint against Lowry and the Peterson defendants which alleged that they conspired with others to injure KRC in connection with the so-called "Lark Oil Transactions" and had deliberately covered up their wrongdoings. *Baer* v. *Franklin Supply Co.*, C-38733 (D. Colo.). On October 1, 1973, the Trustee filed his "167 Report" which alleged the facts underlying his lawsuit against Lowry and the Peterson defendants and which, like *Dietrich* and *First National Bank of Denver*, alleged misconduct with respect to the Arctic Permit transactions. Ohio waited more than three years after the filing of the "167 Report" to bring this lawsuit.

In addition to the foregoing, it is undisputed that on February 20, 1973, one of Ohio's attorneys received from the United States District Court for Colorado the docket sheets in *Pyle* v. *Arthur Anderson & Co.*, C-4486, *Gross* v. Blyth & Co. C-3979, *Hill* v. *Leverenz*, C-4485, *Morell* v. *King*, C-3980, and *Bottger* v. *King Resources Co.*, C-3873. Each of these cases charged either Lowry or the Peterson defendants with aiding and abetting the dissemination of false financial representations concerning KRC to investors generally.

Ohio does not dispute the above facts. Still, Ohio waited over three years, until October 7, 1976, to file this action against Lowry and the Peterson defendants.

REASONS FOR DENYING THE WRIT

I.

The Decisions of the Circuit Courts Are Consistent as to the Effect of Fraudulent Concealment on the Running of the Statute of Limitations and as to What Constitutes Fraudulent Concealment for the Purpose of Tolling the Statute of Limitations.

The Tenth Circuit, in requiring Ohio to exercise due diligence in pursuing its cause of action, followed the standards applied by every Court of Appeals. Nevertheless, Ohio asserts that because Lowry did not unilaterally disclose to it the existence of a so-called "side agreement" concerning the Arctic Permit transactions, Ohio's total lack of diligence in pursuing its cause of action is irrelevant. Ohio further asserts that the statute of limitations should be tolled until it actually discovered the "side agreement." Ohio makes these assertions even though it is undisputed that the "side agreement" relates to a transaction in which Lowry's involvement had been specifically challenged in *Dietrich* and *First National Bank of Denver* and even though that transaction was allegedly part of a more general fraudulent scheme concerning which Ohio itself brought suit in 1972. No Court of Appeals decision supports this unlikely proposition.

The Circuit Courts consistently hold that due diligence by the plaintiff and fraudulent concealment by the defendant are just two elements of the same equitable determination of when the statutory period begins to run. A plaintiff is always required to exercise due diligence in the pursuit of his rights, and the limitations period is tolled until actual discovery only when it is shown that because of the defendant's conduct, the plaintiff could not have discovered his cause of action even if he had exercised diligence. *See, Cook* v. *Avien, Inc.*, 573 F. 2d 685, 694-695 (1st Cir. 1978); *Arneil* v. *Ramsey*, 550 F. 2d 774, 780-781 (2d Cir. 1977); *Biggans* v. *Bache Halsey Stuart Shields, Inc.*, 638 F. 2d 605, 607-608 n. 3 (3d Cir. 1980); *Newman* v. *Prior*, 518 F. 2d 97, 100 (4th Cir. 1975); *McNeal* v. *Paine, Webber, Jackson & Curtis Inc.*, 598 F. 2d 888, 893 n. 11 (5th Cir. 1979); *Gaudin* v. *KDI Corp.*, 576 F. 2d 708, 712 (6th Cir. 1978); *Goldstandt* v. *Bear, Stearns & Co.*, 522 F. 2d 1265, 1269 (7th Cir. 1975); *Buder* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F. 2d 690, 692 (8th Cir. 1981); *Hilton* v. *Mumaw*, 522 F. 2d 588, 602 (9th Cir. 1975); *Dzenits* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F. 2d 168, 171 (10th Cir. 1974); *Wachovia Bank & Trust Co., N.A.* v. *National Student Marketing Corp.*, 461 F. Supp. 999, 1008 (D. D. C. 1978).

Ohio claims *Tomera* v. *Galt*, 511 F. 2d 504 (7th Cir. 1975), is to the contrary and creates a split among the circuits. But *Tomera* held that the defendants' continued refusal to make records available to the plaintiff, their refusal to answer questions about the company's operations, and their total failure to maintain other records constituted such a deliberate stonewalling that no amount of diligence could stonewalling have led the plaintiff to discover his cause of action.[5] Ohio also improperly reads *Robertson* v. *Seidman & Seidman*, 609 F. 2d 583 (2d Cir. 1979), to reach the inaccurate conclusion that a conflict exists among the circuits. In *Robertson*, the court found that a genuine factual issue existed as to whether the plaintiff, once alerted to possibilities of fraud, had been unable to discover the defendant's involvement, even though he did all he reasonably could to pursue his cause of action. The *Robertson* court never reached the issue of whether the statute should be tolled until plaintiff's actual discovery of the defendant's part in the fraud. Thus, *Tomera* v. *Galt* and *Robertson* v. *Seidman & Seidman* are consistent with the holding below, and there is no conflict among the circuits as Ohio claims.

Moreover, even under Ohio's incorrect interpretation of *Tomera* v. *Galt* and *Robertson* v. *Seidman & Seidman*, the result in this case would be affected only if there was active fraudulent concealment by the defendants. But the District Court here found: "[T]here simply is no fraudulent concealment as to Ohio." (A-37).

Ohio's only allegation of "fraudulent concealment" on the part of any defendant is the claim that Lowry placed the so-called "side-agreement" in his personal papers and that in late

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[5] The cases cited approvingly by the *Tomera* court also support the proposition that the statute is tolled until actual discovery of a cause of action only when the defendant actively and directly thwarts the plaintiff's diligent discovery efforts. *Krestich* v. *Stefanez*, 243 Wis. 1, 6-7, 9 N. W. 2d 130, 132 (1943); *Keithly* v. *Mutual Life Ins. Co. of N.Y.*, 271 Ill. 584, 594, 111 N. E. 503, 507 (1916); *Miller* v. *Powers*, 119 Ind. 79, 88, 21 N. E. 455, 457 (1889). *Stanley* v. *Stanton*, 36 Ind. 445, 449-450 (1871). The *Tomera* court quoted from *Smith* v. *Blachley*, 198 Pa. 173, 179, 47 A. 985, 987 (1901):

> If both parties rest on their oars, the statute runs its regular course. But, if the wrongdoer adds to his original fraud affirmative efforts to divert or mislead or prevent discovery, then he gives to his original act a continuing character, by virtue of which he deprives it of the protection of the statute until discovery.

1971 or 1972, after resigning from the Peterson firm, Lowry destroyed that single document which had expired by its terms. There is no claim that any defendant ever refused to provide Ohio with information or that Ohio ever sought any information from any defendant. Indeed, it is undisputed that Lowry has freely acknowledged the existence of the side agreement and has stated its contents whenever questioned about it. There simply is no evidence of active and fraudulent concealment of the "side agreement" by any defendant. Ohio's assertion of fraudulent concealment in this case is tantamount to imposing a duty on officers, directors, and corporate attorneys to invite inspection of their files by potential adversaries whenever litigation is imminent. There is nothing in law or reason to support this proposition.

However, even if Ohio could establish active, fraudulent concealment of this single document, the result in this case would not differ. Concealment of the "side-agreement" cannot be equated with concealment of the alleged fraud. The S. E. C. action against Lowry and the other litigation against these defendants made Ohio's cause of action a matter of public record. The statute does not await the plaintiff's discovery of all the evidence of an alleged fraud perpetrated upon him. *Buder* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F. 2d 690, 693 (8th Cir. 1981); *Arneil* v. *Ramsey*, 550 F. 2d 774, 780 (2d Cir. 1977); *Berry Petroleum Co.* v. *Adams & Peck*, 518 F. 2d 402, 410 (2d Cir. 1975); *Klein* v. *Bower*, 421 F. 2d 338, 343 (2d Cir. 1970). If the law were otherwise, the statute would almost always be tolled indefinitely.[6]

Courts have held that the following have put a plaintiff on notice of his cause of action: proxy statements or annual reports,

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[6] In order to evade the fact that the result here would be the same even if the so-called side-agreement had been actively and fraudulently concealed, Ohio argued below that the statute should be tolled until actual discovery of "hard evidence" of a fraud. The Tenth Circuit flatly rejected that argument. (A-70, A-71).

Buder v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F. 2d 690, 692-693 (8th Cir. 1981), *Turner* v. *First Wisconsin Mortgage Trust*, 454 F. Supp. 899, 904 (E. D. Wis. 1978); conversations with third parties vaguely revealing wrongdoing, *Osadchy* v. *Gans*, 436 F. Supp. 677, 681-682 (D. N. J. 1977); newspaper and periodical articles, *Turner* v. *First Wisconsin Mortgage Trust*, 454 F. Supp. 899, 906 (E. D. Wis. 1978); *National Family Ins. Co.* v. *Exchange National Bank of Chicago*, 474 F. 2d 237, 240 (7th Cir.), *cert. denied*, 414 U. S. 825 (1973); precipitous declines and fluctuations in the market price of securities, *Gaudin* v. *KDI Corp.*, 576 F. 2d 708, 712 (6th Cir. 1978); *Berry Petroleum Co.* v. *Adams & Peck*, 518 F. 2d 402, 410 (2d Cir. 1975); *Hupp* v. *Gray*, 500 F. 2d 993, 996 (7th Cir. 1974); monthly account statements, *Koke* v. *Stifel, Nicolaus & Co., Inc.*, 620 F. 2d 1340, 1343 (8th Cir. 1980); and other related legal proceedings, *Gaudin* v. *KDI Corp.*, *supra*, *Saylor* v. *Lindsley*, 391 F. 2d 965, 970 (2d Cir. 1968). In each of these cases the court held, that as a matter of law, the plaintiffs were on notice of securities law violations on the basis of far less substantial information than Ohio possessed well before October 6, 1973. And, even though this information may have been insufficient to allow the plaintiff to draft his complaint immediately, the plaintiff was deemed to be on notice of his cause of action. The statute of limitations is meant to set the time limit in which the plaintiff can determine whether to sue; it is not measured by the time required to develop a winning lawsuit.

The District Court's decision was based on Ohio's constructive knowledge stemming from Ohio's undisputed involvement in and awareness of other related actions and the media coverage given those lawsuits. However, documents presented to the District Court from Ohio's internal files go further and illustrate Ohio's total lack of diligence.

A January 3, 1972 internal letter states:

> As you know, I am strongly in favor of moving the division of securities to act with dispatch. Under the circumstances,

> *it is inexcusable that no progress has been made to date.* (emphasis added).

On June 5, 1972, Special Counsel to Ohio, retained to assist in the KRC matters, expressed his concern over "what appears to an outsider as a failure to allocate a proper level of resources to the private securities actions against Crofters and others." An April 11, 1973 memorandum reads:

> *Our negligence in this case is stunning.* . . . No one from Ohio has talked to the Trustee, Pfeiffer, or anyone from KRC since last April, 1972, and the last substantive discussion with Pfeiffer was in March of that year, by me.
>
> Similarly, there has been no contact with any creditors in over a year, since Bob Werth . . . undertook one phone call on his own initiative. . . . I cannot emphasize too strongly both the opportunity and the duty for Ohio presented by KRC reorganization, as well as *the fiasco further apathy might well engender.* (emphasis added).

An April 30, 1973 memorandum states:

> These matters [KRC, Four Seasons and Herb cases] are merely being tossed back and forth from one person to another and no one is giving them careful enough consideration.

These examples are merely the tip of the iceberg. The District Court, of course, had before it numerous other specific examples of Ohio's somnolence and maladministration of its cause of action. Ohio did not dispute the genuineness or relevancy of any of the exhibits submitted to the District Court. After examining the undisputed "summary judgment papers in the light most favorable to the party opposing the motion," the court concluded:

> Upon the undisputed record, it is quite clear that Ohio's conduct exceeded simple negligence and amounted to intentional disregard of a known risk. (A-36).

Accordingly, even if the defendants' failure to unilaterally disclose the "side agreement" amounted to fraudulent concealment—which it does not—and even if the concealment of that evidence rises to the level of concealment of a cause of action—which it does not—the result in this case would be the same because the undisputed facts demonstrate that there is no viable issue as to Ohio's diligence in pursuing its claim.

II.

The Court Below Correctly Applied the Federal Equitable Tolling Doctrine to a Claim Brought Under Federal Securities Law.

In actions brought under Sections 10(b) and 20 of the Securities Exchange Act of 1934, federal courts apply the statute of limitations which the forum state applies to the most analogous state cause of action. *Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, 210, n. 29 (1976). Federal common law, however, determines when the limitation period begins to run. *Holmberg* v. *Armbrecht,* 327 U. S. 392 (1946); *Cook* v. *Avien, Inc.,* 573 F. 2d 685, 694 (1st Cir. 1978); *Phillips* v. *Levie,* 593 F. 2d 459, 462 (2d Cir. 1979); *Biggans* v. *Bache Halsey Stuart Shields, Inc.,* 638 F. 2d 605, 607 (3d Cir. 1980); *Newman* v. *Prior,* 518 F. 2d 97, 100 (4th Cir. 1975); *White* v. *Sanders,* 650 F. 2d 627, 630 (5th Cir. 1981); *Gaudin* v. *KDI Corp.,* 576 F. 2d 708, 711 (6th Cir. 1978); *Tomera* v. *Galt,* 511 F. 2d 504, 509 (7th Cir. 1975); *Vanderboom* v. *Sexton,* 422 F. 2d 1233, 1240 (8th Cir.), *cert. denied,* 400 U. S. 852 (1970); *Hilton* v. *Mumaw,* 522 F. 2d 588, 602 (9th Cir. 1975); *Esplin* v. *Hirschi,* 402 F. 2d 94, 103 (10th Cir. 1968).

Although the court below followed this well established principle of law, Ohio argues that the Court of Appeals erred in declining to interpret *Board of Regents* v. *Tomanio,* 446 U. S. 478 (1980), as overruling *Holmberg* v. *Armbrecht,* 327 U. S. 392 (1946) and as controlling actions brought under federal securities law.

Even after this Court's decision in *Tomanio,* the federal courts have consistently held that federal law controls on the issue of when the statute of limitations begins to run in federal securities cases. *White* v. *Sanders,* 650 F. 2d 627, 630 (5th Cir. 1981); *IIT* v. *Cornfeld,* 619 F. 2d 909, 929 (2d Cir. 1980); *Biggans* v. *Bache Halsey Stuart Shields, Inc.,* 638 F. 2d 605, 607 (3d Cir. 1980); *Ross* v. *A. H. Robbins Co.,* Fed. Sec. L. Rep. (CCH) ¶98,205 at 91,431 (S. D. N. Y., 1981); *Cunha* v. *Ward Foods, Inc.,* 501 F. Supp. 830, 837 (D. Hawaii, 1980); *Campbell* v. *Upjohn Co.,* 498 F. Supp. 722, 726 (W. D. Mich., 1980).

Ohio points to *O'Hara* v. *Kovens,* 625 F. 2d 15 (4th Cir. 1980), *cert. denied,* 101 S. Ct. 939 (1981), in an effort to argue that the Fourth Circuit has decided differently. First, it should be noted that *O'Hara* is the only case which even arguably applies the rationale of *Tomanio* in a non-civil rights context. Furthermore, the court in *O'Hara* did not have to directly address the issue of whether the Maryland state tolling doctrine should be applied to a federal securities law case. The issue in *O'Hara* was whether the statute should be tolled because of the plaintiff's mental incompetency, but neither the federal *nor* the Maryland tolling doctrine applied under these circumstances. *Casias* v. *United States,* 532 F. 2d 1339, 1342 (10th Cir. 1976); *Accardi* v. *United States,* 435 F. 2d 1239, 1241, n. 2 (3d Cir. 1970); *Williams* v. *United States,* 228 F. 2d 129, 132 (4th Cir. 1955), *cert. denied,* 351 U. S. 986 (1956). Therefore, to the extent *O'Hara* could be read as support for Ohio's position, the relevant language in *O'Hara* is mere dicta.

More importantly, even if Colorado law were applied to this issue, Ohio's action would still be time-barred because Colorado's tolling doctrine is precisely the same as the federal doctrine. As the Tenth Circuit recently stated in *Aldrich* v. *McCulloch Properties, Inc.,* 627 F. 2d 1036, 1041 (1980):

> Under both Colorado and federal law, the limitations period begins to run when the aggrieved party discovers, or should have discovered by the exercise of reasonable diligence, the facts constituting the fraud.

A plaintiff suing under Colorado law must always exercise due diligence even when the defendant conceals plaintiff's cause of action. The statute of limitations is tolled until actual discovery of a cause of action only when the plaintiff could not have discovered his cause of action because of the defendant's fraudulent conduct. *See, Owens* v. *Brochner,* 172 Colo. 525, 528, 474 P. 2d 603, 605 (Colo. 1970); *Rosane* v. *Senger,* 112 Colo. 363, 367, 149 P. 2d 372, 374 (1944); *Shockley* v. *Public Service Company of Colorado,* 525 P. 2d 1183, 1184 (Colo. App. 1974). This, of course, is exactly the standard applied by the court below. Accordingly, even if the rationale of *Tomanio* applied to this case, Ohio's claim would still be time-barred.

Colorado law highlights another reason why this Court should deny the Petition. The question of the applicability of *Tomanio* to securities fraud or other non-civil rights cases is important only to the extent that state and federal laws differ as to when a statute of limitations will be tolled for equitable considerations. At least with respect to the issue of the nature of acts of concealment by a defendant which toll the limitations period, there seems to be little or no difference between federal and states' laws. *See, Tomera* v. *Galt,* 511 F. 2d 504, 510 (7th Cir. 1975). In sum, the issue of *Tomanio's* application to securities law cases is simply an unimportant issue.

III.

The Correct Standard Applicable to Motions for Summary Judgment Was Applied in This Case.

Contrary to Ohio's assertion in the Petition, the Tenth Circuit did not "tacitly" recognize the existence of a genuine factual issue. Rather, the District Court stated:

> The court has examined the pleadings, exhibits, affidavits and other material on file herein and concludes that no genuine issue as to any material fact exists in this case and that defendants are entitled to judgment as a matter of law. (A-38).

Nothing in the Court of Appeals' opinion upsets this conclusion, and at no point did the Tenth Circuit indicate the existence of a genuine issue of material fact.

The District Court's decision was clearly based on undisputed facts. Ohio does not dispute that the numerous complaints filed from 1971 to 1973 against Lowry and the Peterson defendants contain every substantive allegation which Ohio chose not to make until October 7, 1976. Ohio does not dispute that in April, 1972 it filed its own suit alleging the same cause of action with respect to the same purchase of KRC notes. Ohio does not dispute the media attention which KRC litigation matters received. Ohio does not dispute that ***Dietrich*** and ***First National Bank of Denver*** both charged Lowry with securities law violations and pointed specifically to the Arctic Permit Transactions. Ohio does not dispute that one of its own attorneys, in reviewing Ohio's pursuit of its KRC claims, concluded, "Our negligence in this case has been stunning," nor does it dispute the existence, accuracy, or authenticity of the numerous documents which describe Ohio's total disregard for its claims.

Ohio has created a "straw-man" argument concerning the standard applied to defendants' summary judgment motion. Ohio lifts language from the Court of Appeals' opinion which describes a trial court judge's review of the pleadings, exhibits, and affidavits before it when deciding a motion for summary judgment. Ohio then asserts that that review process violates the standards of Rule 56 because it "is predicated upon the existence of factual issues." Petition, p. 17. Of course, the Rule 56 requirement is that the trial judge find no ***genuine*** issue of ***material*** fact before granting summary judgment, and in order to make that determination, a trial court judge has only the documentary evidence before him to examine.

It is particularly ironic that Ohio should argue that a judge's review of the facts before him in and of itself violates Rule 56. The District Court originally granted the defendants' motions to dismiss by taking judicial notice of Ohio's involvement in the consolidated KRC actions, many of which named these defendants. Ohio successfully argued to the Tenth Circuit that it should be given the chance to present additional evidence regarding its due diligence and its actual and constructive knowledge of its cause of action before defendants' Rule 56 motion could be ruled upon. Now that the District Court has reviewed the evidence presented by both sides, Ohio argues that same review process violates the rule!

Ohio's argument amounts to an assertion that any time a late-filing plaintiff in a securities action alleges fraudulent concealment and files an affidavit stating that he only recently obtained actual knowledge of facts implicating a particular defendant in the fraud, the trial court is precluded from entering summary judgment for the defendants on statute of limitations grounds—regardless of other, *undisputed* evidence in the record which bars the plaintiff's claim. Petition, pp. 17-21. This assertion is absurd and contrary to Rule 56. Indeed, one of the very purposes of Rule 56 is to allow the court to test the genuineness of issues and the materiality of facts in order to defeat "dilatory tactics resulting from the assertion of unfounded claims or the interposition of specious denials or sham defenses." 10 Wright & Miller, *Federal Practice and Procedure,* §2711, p. 370 (1973).

The Tenth Circuit's opinion in this case is consistent with the long-established standards applicable to Rule 56 motions. Ohio itself cites the Tenth Circuit's opinion in *Dzenits* v. *Merrill Lynch, Pierce, Fenner & Smith,* 494 F. 2d 168 (1974), as setting forth the proper standard to be applied to Rule 56 motions on facts like these. But, the Court of Appeals also relied upon *Dzenits* as support for its holding. Ohio's interpretation of the Court of Appeals' opinion would require one to believe that the Tenth Circuit intended to overrule *Dzenits,* its leading case dealing with tolling the statute of limitations in securities fraud cases, without even discussing such a radical departure. There is simply no reason to accept such an interpretation, especially when the Tenth Circuit, since the ruling below, has reaffirmed its commitment to traditional Rule 56 standards. *Baum* v. *Gillman*, 648 F. 2d 1292, 1297 (10th Cir. May, 1981). Instead, the Tenth Circuit's opinion must be read as merely describing the necessary process of reviewing pleadings, exhibits, affidavits, and other material which a district court goes through in order to decide a summary judgment motion.

In sum, the Tenth Circuit's opinion cannot be fairly read as endorsing a radical departure from traditional Rule 56 standards, and there is no conflict among the circuits as to the proper standard to apply to Rule 56 motions.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

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